TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 542

THE CITY OF YONKERS, PETITIONER,

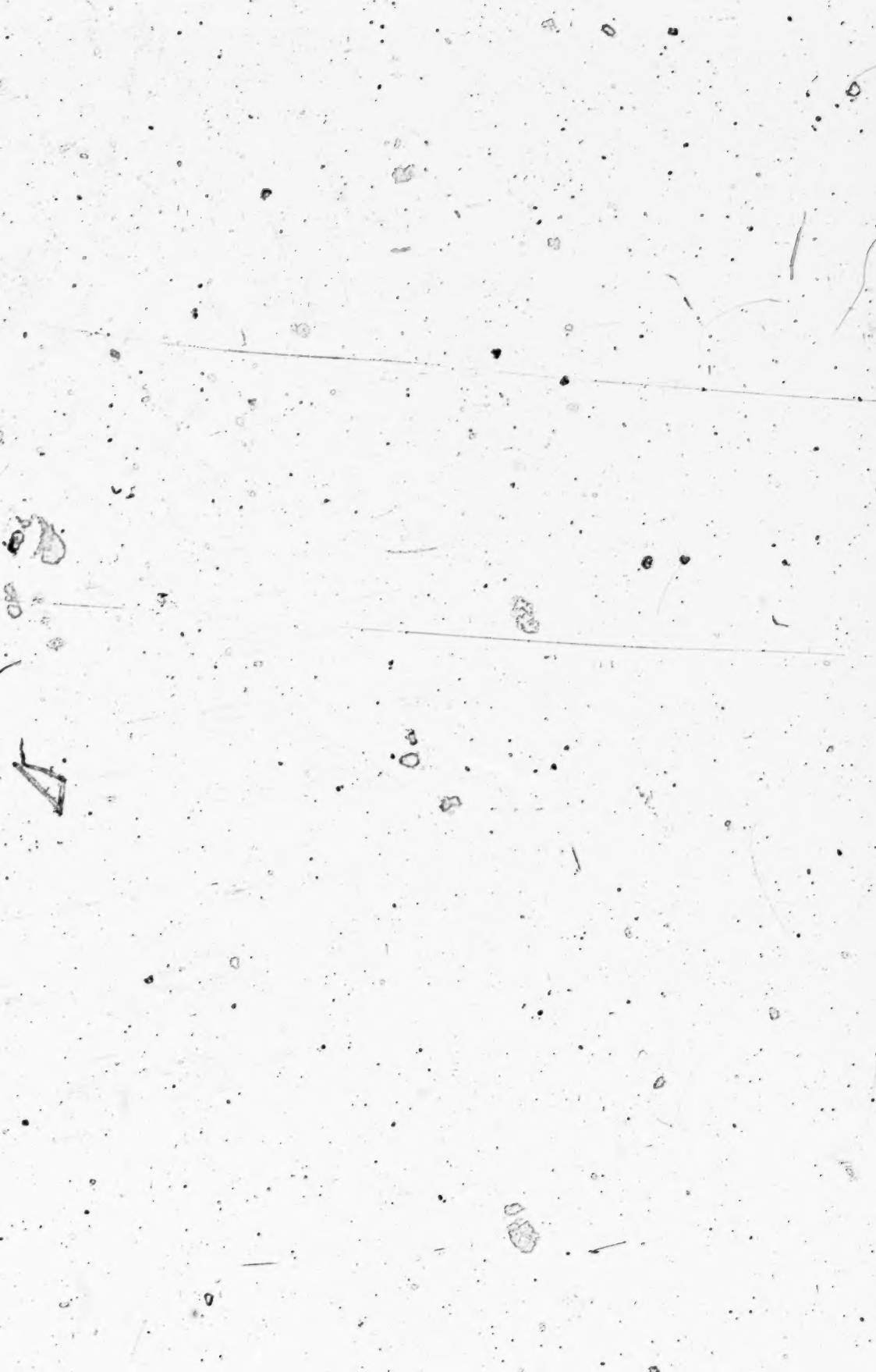
vs.

WALTER F. DOWNEY, RECEIVER OF THE FIRST NATIONAL BANK AND TRUST COMPANY OF YONKERS, IN LIQUIDATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1939.

CERTIORARI GRANTED DECEMBER 18, 1939.



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Walter F. Downey,
Direct 28
Cross 30

John B. Power,
Direct 31
Cross 38

Carl H. Vanvick,
Direct 48
Cross 55
Re-direct 56

WITNESS FOR DEFENDANT:

GUSTAV W. KLEIN,
Direct 69
Cross 73
Re-direct 76, 77
Re-cross 76

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	Offered at Page	Printed at Page
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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,

against

THE CITY OF YONKERS,
Defendant-Appellant.

Statement Under Rule 13.

This is an appeal by the defendant above named from a judgment made and entered in the office of the Clerk of the United States District Court for the Southern District of New York on August 5, 1938, in the above entitled case in favor of the plaintiff, Walter F. Downey, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, against the defendant, The City of Yonkers, in the sum of $138,551.88 together with interest thereon in the sum of $21,344.71 and costs in the sum of $74.15.

This action was commenced on April 17, 1936, by the original plaintiff herein, Arthur E. Muth, as Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, by the filing of a praecipe and the issuance of a summons.

The summons and complaint with proof of service were filed on April 23, 1936. The defendant filed an answer on July 21, 1936, which was thereafter amended by stipulation dated November 24, 1937. Walter F. Downey having been appointed Receiver of the First National Bank and Trust Company in the place of Arthur E. Muth on November 15,

4 *Statement Under Rule 13.*

1937, he was, by an order dated November 26, 1937, substituted as plaintiff herein in the place and stead of said Arthur E. Muth.

On January 5 and 6, 1938, this case was tried before Honorable John Knight without a jury, a jury having been waived by stipulation on the record. Judge Knight reserved decision.

On June 8, 1938, Judge Knight rendered his decision in favor of the plaintiff containing findings at the end thereof.

5 On July 18, 1938, additional findings of fact and conclusions of law which had been requested by plaintiff were signed by Judge Knight and on the same day Judge Knight signed a memorandum containing his rulings upon the defendant's requests for findings of fact and conclusions of law. The findings and memorandum were filed on or about July 29, 1938.

On August 3, 1938, costs were taxed in the sum of $74.15 and on August 5, 1938, judgment was entered by the plaintiff in the sum of $138,551.88 with interest thereon in the sum of $21,344.71.

Thereafter defendant made a motion to determine the
6 applicability of the new Rules of Civil Procedure for guidance on the appeal herein. Judge Knight determined under Rule 85 that the application of the new rules would not be feasible and would work injustice in this case. Accordingly, the former procedure has been followed herein, except that in addition appeal was taken under new procedure out of abundant caution.

On October 31, 1938, an appeal was allowed defendant from the said judgment of August 5, 1938.

There was no arrest, attachment or reference herein.

Plaintiff has appeared throughout the proceedings in the above entitled action by Benjamin W. Moore, Esq., and the defendant has appeared by Leonard G. McAneny, Esq., Corporation Counsel of The City of Yonkers.

Docket Entries.

4/17/36	Filed praecipe and issued summons.
4/23/36	Filed summons and complaint and aff. of service 4/23/36.
7/21/36	Filed stipulation extending time to answer to 7/23/36.
7/21/36	Filed answer of Defendant.
11/20/37	Filed note of issue motion to substitute party, plaintiff. Ret. 11/26/37.
11/23/37	Filed note of issue motion to amend answer. Ret. 11/26/37 (and copy of motion).
11/26/37	Filed aff. notice of motion to substitute Receiver as party plaintiff. No opposition, motion granted, Mandelbaum, J.
11/26/37	Filed order substituting Receiver as party plaintiff, Mandelbaum, J.
1/ 5/38	Before Knight, J. Trial begun. Jury waived by stip. Concluded. Decisions reserved.
6/13/38	Filed opinion No. 11,468. Plaintiff to recover $138,551.88. Knight, J.
7/29/38	Filed findings of fact and conclusions of law. Knight, J.
7/29/38	Filed Defendant's requests for findings and conclusions.
7/29/38	Filed opinion No. 11595 on Defendant's request for findings and conclusions. Knight, J.
8/ 3/38	Filed bill of costs taxed at $74.15.
8/ 5/38	Filed judgment No. 38412 for Plaintiff for $159,970.74.

10 *Docket Entries.*

9/26/38 Filed note of issue motion to determine. Civ. Rules 46 and 37. Ret. 10/4/38.

10/22/38 Filed affidavit and notice of motion to determine Civ. Rules 46 and 73.

10/22/38 Filed affidavit in opposition to motion to determine Civ. Rules 46 and 73.

10/22/38 Filed order denying motion to determine Civ. Rules 46 and 73. Knight, J.

11 10/28/38 Filed order extending time to file bill of exceptions to 1/7/39. Conger, J.

10/29/38 Filed exceptions. Knight, J.

10/31/38 Filed petition and order allowing appeal. Bondy, J.

10/31/38 Filed assignments of Errors.

10/31/38 Filed cost bond on appeal—Great American Indemnity Co.

11/ 1/38 Filed notice of appeal and mailed copy to Benjamin W. Moore, 11/2/38.

12 11/ 3/38 Filed citation. Ret. 30 days.

11/22/38 Filed Bill of Exceptions and settlement of same (Knight).

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Summons.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, as Receiver of The First National Bank and Trust Company of Yonkers, New York,

against

THE CITY OF YONKERS.

L. 64, Page 51.

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To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

15

WITNESS, the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 17th day of April, A. D. 1936.

CHARLES WEISER,
Clerk.

(SEAL)

BENJAMIN W. MOORE,
Plaintiff's Attorney,
Office and Post Office Address:
30 South Broadway,
Yonkers, New York.

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Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, as Receiver of The First National Bank and Trust Company of Yonkers, New York,

Plaintiff,

17 *against*

THE CITY OF YONKERS,

Defendant.

Plaintiff complaining of the defendant, by his attorney, Benjamin W. Moore, alleges:

FOR A FIRST CAUSE OF ACTION.

First.—That at all times since the 30th day of September, 1929 the First National Bank and Trust Company
18 of Yonkers has been a national banking corporation organized and existing under the laws of the United States with its principal place of business in the City of Yonkers, County of Westchester and State of New York.

Second.—That the defendant was at all times hereinafter mentioned and now is a municipal corporation duly organized and existing under the Laws of the State of New York.

Third.—That on the 4th day of March, 1933 said First National Bank and Trust Company of Yonkers, New York

suspended all transactions and business and thereafter never reopened in the regular course of business, and that on the 20th day of March, 1933 the Comptroller of the Currency of the United States acting under and pursuant to the Bank Conservation Act enacted by the Congress of the United States on March 9, 1933 duly appointed Percival W. Trudeau as Conservator of said First National Bank and Trust Company of Yonkers, and said Conservator, under the direction of said Comptroller, on said March 20, 1933, duly took possession of the books, records and assets of every description of said First National Bank and Trust Company of Yonkers, New York and continued to act as such Conservator until July 24, 1933: that Louis D. Rossire was on said July 24, 1933, by like authority, duly appointed by said Comptroller of the Currency as successor Conservator of said First National Bank and Trust Company of Yonkers, New York in the place and stead of said Percival W. Trudeau; and that said Louis D. Rossire duly qualified as such Conservator and continued to act as such until the 23rd day of January, 1934: that the said Comptroller of the Currency had become satisfied of the insolvency of said First National Bank and Trust Company of Yonkers, New York and that the plaintiff was on that day duly appointed by said Comptroller of the Currency as Receiver of the said First National Bank and Trust Company of Yonkers, New York to liquidate said bank as of the said 4th day of March, 1933, and that the plaintiff has duly qualified and is now acting as such Receiver.

Fourth.—Upon information and belief that from the said 30th day of September, 1929 the defendant has maintained certain of its funds in a deposit account in said Bank under the caption "Treasurer, City of Yonkers" and on the said 4th day of March, 1933 the credit balance of

said deposit account, together with accrued interest computed to the said 4th day of March, 1933, amounted to the sum of $280,545.24.

Fifth.—Upon information and belief that from the said 30th day of September, 1929, and on divers dates during the existence of said deposit account, maintained as aforesaid by the defendant, said First National Bank and Trust Company of Yonkers, New York pledged with and to the defendant, as security for the repayment of the indebtedness evidenced by said deposit account and as security for 23 the repayment of the indebtedness evidenced by certain other deposit accounts, certain of the assets of the said Bank consisting of various and sundry bonds, a schedule of which is attached hereto, marked Exhibit A, and made a part of this complaint, and that the pledge of assets so made to secure the repayment of the indebtedness evidenced by the deposit account maintained as aforesaid by the defendant was unlawful, illegal, *ultra vires*, null and void.

Sixth.—Upon information and belief that on divers dates from the said 20th day of March, 1933 to or about the 16th day of December, 1933 all of the aforesaid assets 24 so pledged with the defendant were recovered from the defendant by payments on account of all the aforesaid deposit accounts and on the 22nd day of January, 1934 the deposit account maintained as aforesaid by the defendant stood paid out in full except for the sum of $126.49.

Seventh.—That under date of December 16, 1933 there was made available to all creditors of the said Bank a first dividend of 40% of the amount of their deposits at the time of the Bank's suspension.

Eighth.—That the said payments referred to in paragraph marked "Sixth" of this complaint on account of

the deposit account maintained by the defendant as aforesaid were not ratable with and proportionate to the said dividend made available to the other creditors of said Bank and were unlawful, illegal, *ultra vires,* null and void.

Ninth.—That there is now justly due and owing from the defendant to the plaintiff the sum of $168,200.65 representing the difference between the said 40% dividend and the said payments totalling $280,418.75.

Tenth.—That no part of said sum has been paid although payment thereof has been duly demanded.

FOR A SECOND CAUSE OF ACTION.

Eleventh.—That the plaintiff realleges, as though here fully set forth, each and every allegation contained in the paragraphs of this complaint marked "First", "Second", "Third" and "Seventh".

Twelfth.—Upon information and belief that from the said 30th day of September, 1929 the defendant maintained certain of its funds in a deposit account in said Bank under the caption "City of Yonkers" and on the said 4th day of March, 1933 the credit balance of said deposit account, together with accrued interest computed to the said 4th day of March, 1933 amounted to the sum of $1,502.84.

Thirteenth.—Upon information and belief that from the said 30th day of September, 1929, and on divers dates during the existence of said deposit account, maintained as aforesaid by the defendant, said First National Bank and Trust Company of Yonkers, New York pledged with and to the defendant, as security for the repayment of the indebtedness evidenced by said deposit account and as security for the repayment of the indebtedness evidenced

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by certain other deposit accounts, certain of the assets of the said Bank consisting of various and sundry bonds, a schedule of which is attached hereto, marked Exhibit A, and made a part of this complaint, and that the pledge of assets so made to secure the repayment of the indebtedness evidenced by the deposit account maintained as aforesaid by the defendant was unlawful, illegal, *ultra vires*, null and void.

Fourteenth.—Upon information and belief that on
29 divers dates from the said 20th day of March, 1933 to or about the 16th day of December, 1933 all of the aforesaid assets so pledged with the defendant were recovered from the defendant by payments on account of all of the aforesaid deposit accounts and on the 21st day of July, 1933 the deposit account maintained as aforesaid by the defendant stood paid out in full.

Fifteenth.—That the said payments referred to in paragraph marked "Fourteenth" of this complaint on account of the deposit account maintained by the defendant as aforesaid were not ratable with and proportionate to the said dividend made available to other creditors of the said
30 Bank and were unlawful, illegal, *ultra vires*, null and void.

Sixteenth.—That there is now justly due and owing from the defendant to the plaintiff the sum of $901.70 representing the difference between the said 40% dividend and the said payments totalling $1,502.84.

Seventeenth.—That no part of said sum has been paid although payment thereof has been duly demanded.

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FOR A THIRD CAUSE OF ACTION.

Eighteenth.—That the plaintiff realleges, as though here fully set forth, each and every allegation contained in the paragraphs of this complaint marked "First", "Second", "Third" and "Seventh".

Nineteenth.—Upon information and belief that from the said 30th day of September, 1929 the defendant maintained certain of its funds in a deposit account in said Bank under the caption "Nepperhan Sewer Fund" and on 32
the said 4th day of March, 1933 the credit balance of said deposit account, together with accrued interest computed to the said 4th day of March, 1933, amounted to the sum of $621.88.

Twentieth.—Upon information and belief that from the said 30th day of September, 1929, and on divers dates during the existence of said deposit account, maintained as aforesaid by the defendant, said First National Bank and Trust Company of Yonkers, New York pledged with and to the defendant, as security for the repayment of the indebtedness evidenced by said deposit account and as 33
security for the repayment of the indebtedness evidenced by certain other deposit accounts, certain of the assets of the said Bank consisting of various and sundry bonds, a schedule of which is attached hereto, marked Exhibit A, and made a part of this complaint, and that the pledge of assets so made to secure the repayment of the indebtedness evidenced by the deposit account maintained as aforesaid by the defendant was unlawful, illegal, *ultra vires*, null and void.

Twenty-first.—Upon information and belief that on divers dates from the said 20th day of March, 1933 to or

34 *Complaint.*

about the 16th day of December, 1933 all of the aforesaid assets so pledged with the defendant were recovered from the defendant by payments on account of all the aforesaid deposit accounts and on the 4th day of May, 1933 the deposit account maintained as aforesaid by the defendant was paid out in full.

Twenty-second.—That the said payment referred to in paragraph marked "Twenty-first" of this complaint of the deposit account maintained by the defendant as aforesaid
35 was not ratable with and proportionate to the said dividend made available to the other creditors of the said Bank and was unlawful, illegal, *ultra vires*, null and void.

Twenty-third.—That there is now justly due and owing to the plaintiff from the defendant the sum of $373.13 representing the difference between the said 40% dividend and the said payment of $621.88.

Twenty-fourth.—That no part of said sum has been paid although payment thereof has been duly demanded.

WHEREFORE, plaintiff demands judgment against the de-
36 fendant for the sum of $169,475.48 with interest upon the sum of $168,200.65 from the 22nd day of January, 1934, and with interest upon the sum of $901.70 from the 21st day of July, 1933, and with interest upon the sum of $373.13 from the 4th day of May, 1933, besides the costs and disbursements of this action.

BENJAMIN W. MOORE,
Attorney for Plaintiff,
Office & P. O. Address,
30 South Broadway,
Yonkers, New York.

Schedule A.

Description of Assets Pledged	Face Value
Fourth 4¼ Liberty Loan Bonds	$ 40,000.00
Town of Cortland, New York	37,000.00
City of New York, Corp. Stock	10,000.00
Town of Tonawanda, Sewer Bonds	45,000.00
City of Yonkers, School Bonds	10,000.00
United States Fourth Liberty Loan Bonds, 4¼%	15,000.00
State of Arkansas, 4½s, due 1942	50,000.00
Butte, Montana, 6s, due 1941	15,000.00
Charlotte, North Carolina, 4½s, due 1934	5,000.00
Galveston, Texas, 5s, due 1933-1935	12,000.00
Town of Greenburgh, New York, 4½s, due 1946	15,000.00
Town of Greenburgh, New York, 4½s, due 1953	5,000.00
Town of Greenburgh, New York, 4½s, due 1954	1,000.00
Town of Huntington, Long Island, 4½s, due 1938	2,000.00
Town of Huntington, Long Island, 4½s, due 1945	2,000.00
Town of Huntington, Long Island, 4½s, due 1946	7,000.00
County of Jefferson, Alabama, 5s, due 1947	15,000.00
State of Louisiana, 4¾s, 1973	10,000.00
State of Louisiana, 4½s, 1953	5,000.00
New Orleans, 4½s, due 1956	5,000.00
City of New York, 4½s, due 1965	10,000.00
Norfolk, Virginia, 4½s, due 1935	10,000.00
Norfolk, Virginia, 4½s, due 1935	15,000.00

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Description of Assets Pledged	Face Value
State of Oregon, 5½s, due 1937	$ 2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1946	2,500.00
City of Orlando, Florida, 5½s, due 1952	25,000.00
Portsmouth, Virginia, 5s, due 1954	10,000.00
City and County of San Francisco, 5s, due 1945	10,000.00
41 Village of Sea Cliff, New York, 5s, due 1933	1,000.00
State of South Dakota, 5s, due 1938	15,000.00
Winston-Salem, North Carolina, 4¾s, due 1936	14,000.00
Canadian, Int. Paper, 6s, due 1949	25,000.00
Comm. of Kentucky, 4½s, due 1950	50,000.00
Town of Lyndhurst, 5½s, due 1934	55,000.00
State of New Mexico, 6s, due 1935	25,000.00
Bay City, 4s, due 1935	3,000.00
Seattle, Washington, 5s, due 1934	6,000.00
Seattle, Washington, 5s, 1940	2,000.00
Teaneck, New Jersey, 4½s, due 1934	25,000.00
42 Union, 6s, due 1934	25,000.00
Ohio Public Service, 6s, due 1953	30,000.00
South Bay Cons. Water Co., 5s, due 1950	10,000.00
Laclede Gas Light Co., 5½s, due 1935	5,000.00
Total Face Value	$692,000.00

(Duly verified by Arthur E. Muth on April 22, 1936.)

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Answer as Amended by Stipulation, Dated November 23, 1937.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, as Receiver of The First National Bank and Trust Company of Yonkers, New York,

against

THE CITY OF YONKERS.

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The defendant by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, for its answer to the plaintiff's complaint, respectfully shows and alleges:

As to the First Cause of Action:

First.—Denies each and every allegation of said complaint in paragraphs numbered "Eighth", "Ninth", and "Tenth". 45

Second.—Denies any knowledge or information sufficient to form a belief as to allegations contained in paragraphs numbered "Third", and "Seventh".

Third.—Denies each and every allegation of said complaint in paragraph numbered "Fifth", insofar as it is alleged that the pledge of assets made to secure the repayment of the indebtedness evidenced by the dposit account maintained by the City of Yonkers was unlawful, illegal, *ultra vires*, null and void. Further denies that the schedule

46 *Answer as Amended by Stipulation, Dated November 23, 1937.*

as set forth and marked "Exhibit A" is a correct list of the securities pledged with the City of Yonkers on or about the 4th day of March, 1933, in that the following bonds on or about said date was not in possession of said City:

Fourth 4½ Liberty Loan Bonds	$40,000.00
Town of Cortland, New York	37,000.00
City of New York, Corp. Stock	10,000.00
Town of Tonawanda, Sewer Bonds	45,000.00
City of Yonkers, School Bonds	10,000.00
47 United States Fourth Liberty Loan Bonds, 4½%	15,000.00

Fourth.—Admits each and every allegation of said complaint in paragraph numbered "Fourth" except denies that the amount together with accrued interest computed to the 4th day of March, 1933 amounted to the sum of $280,545.24.

Fourth—A. Denies each and every allegation contained in the paragraphs of the complaint numbered "Sixth", "Fourteenth" and "Twenty-first".

48 *As a First, Separate and Complete Defense to the First Cause of Action, the Defendants Further Allege:*

Fifth.—That upon information and belief that on or before the 4th day of March, 1933, the First National Bank and Trust Company of Yonkers had the authority to pledge its assets to secure public money in the State of New York.

Sixth.—That prior to the 3rd day of March 1933, the said First National Bank and Trust Company of Yonkers pledged certain securities with the City of Yonkers as se-

curity for the repayment of its deposits by the said bank, as more clearly shown by plaintiff's "Exhibit A" except as hereinbefore denied. 49

Seventh.—That the said deposit of the City of Yonkers was a public fund of the said City.

As a Second, Separate and Complete Defense to the First Cause of Action, the Defendants Further Allege: 50

Eighth.—That upon information and belief that on or about the 4th day of March, 1933, the City of Yonkers held as security for its deposits negotiable bonds in the sum of $535,000.00, of the First National Bank and Trust Company of Yonkers.

Ninth.—That upon information and belief there was on deposit on the 4th day of March, 1933 to the credit of the City of Yonkers' depositor's account the sum of $275,105.53.

Tenth.—That upon information and belief that prior to the 2nd day of May, 1933, Percival W. Trudeau, as Conservator of the First National Bank and Trust Company of Yonkers, voluntarily released all moneys of the said City of Yonkers to the said City. 51

Eleventh.—That upon information and belief the said release of said City's deposits was made pursuant to instructions of the Comptroller of Currency of the United States or his deputies.

Twelfth.—That upon information and belief that said City deposits were released only after an opinion was

52 *Answer as Amended by Stipulation, Dated November 23, 1937.*

given to the Conservator, Percival W. Trudeau, by his attorney.

Thirteenth.—That the said City of Yonkers relying upon the voluntary return of all moneys of the said City surrendered to the Conservator of the First National Bank and Trust Company of Yonkers the aforesaid securities in the sum of $535,000.00.

Fourteenth.—That the said payment by the Conser-
53 vator and his successor was voluntary and without duress or fraud and cannot be recovered back.

Fifteenth.—That in consideration for the return of all moneys of the said City of Yonkers, the said City returned to the Conservator of the First National Bank and Trust Company bonds owned by the said Bank in the sum of $535,000.00 and were returned to the said Bank in full satisfaction and discharge of any claim of the plaintiff in the complaint mentioned and in view of all demands to that date.

54 *As a Third, Separate and Complete Defense to the First Cause of Action, Defendants Further Allege:*

Sixteenth.—That on or about the 2nd day of May, 1933, Percival W. Trudeau, as Conservator of the First National Bank and Trust Company of Yonkers, in consideration of the return of securities held by the City of Yonkers in the sum of $535,000.00, released the deposits of the said City of Yonkers, and that the said release of the deposits constituted a release of the defendant of and from all liability to the plaintiff for any and all claims of the plaintiff, Bank,

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against the defendant, City of Yonkers, including the alleged cause of action set forth in the complaint and against any and all claim in regard to said deposit which might thereafter arise against the defendant for and on account of anything done by the defendant prior to the date of the release of said moneys.

As a Fourth, Separate and Complete Defense to the First Cause of Action, the Defendants Further Allege:

56

Seventeenth.—That the aforesaid payments to the City of Yonkers of its deposits were voluntary payments, and at the time of said payments, the First National Bank and Trust Company of Yonkers was not insolvent.

AS TO THE SECOND CAUSE OF ACTION.

Eighteenth.—Denies any allegation or information sufficient to form a belief as to allegations contained in paragraph numbered "Eleventh" hereinbefore denied, to wit: paragraph marked "Seventh".

57

Nineteenth.—Admits each and every allegation of said complaint numbered "Thirteenth" except denies the schedule of bonds pledged with the said City of Yonkers and marked plaintiff's "Exhibit A" as hereinbefore denied, and denies that the said pledge of assets to secure the repayment of the indebtedness evidenced by the deposit account as maintained by the defendant, was unlawful, illegal, *ultra vires*, and null and void.

Twentieth.—Denies each and every allegation of said complaint in paragraphs numbered "Fifteenth", "Sixteenth", and "Seventeenth".

58 *Answer as Amended by Stipulation, Dated November 23, 1937.*

As a First, Separate and Complete Defense to the Second Cause of Action, the Defendants Further Allege:

Twenty-first.—That upon information and belief that on or before the 4th day of March, 1933, the First National Bank and Trust Company of Yonkers had the authority to pledge its assets to secure public money in the State of New York.

59 *Twenty-second.*—That prior to the 3rd day of March, 1933, the said First National Bank and Trust Company of Yonkers pledged certain securities with the City of Yonkers as security for the repayment of its deposits by the said bank, as more clearly shown by plaintiff's "Exhibit A", except as hereinbefore denied.

Twenty-third.—That the said deposit of the City of Yonkers was a public fund of the said City.

As to the second, separate and complete defense to the second cause of action, the defendants further

60 *allege:*

Twenty-fourth.—That upon information and belief that on or about the 4th day of March, 1933, the City of Yonkers held as security for its deposits negotiable bonds in the sum of $535,000.00, of the First National Bank and Trust Company of Yonkers.

Twenty-fifth.—That upon information and belief that prior to the 2nd day of May, 1933, Percival W. Trudeau, as Conservator of the First National Bank and Trust Company of Yonkers, voluntarily released all moneys of the said City of Yonkers to the said City.

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Twenty-sixth.—That upon information and belief the said release of said City's deposits was made pursuant to instructions of the Comptroller of Currency of the United States or his deputies.

Twenty-seventh.—That upon information and belief that said City deposits were released only after an opinion was given to the Conservator, Percival W. Trudeau, by his attorney.

Twenty-eighth.—That the said City of Yonkers relying 62
upon the voluntary return of all moneys of the said City surrendered to the Conservator of the First National Bank and Trust Company of Yonkers the aforesaid securities in the sum of $535,000.00.

Twenty-ninth.—That the said payment by the Conservator and his successor was voluntary and without duress or fraud, and cannot be recovered back.

Thirtieth.—That in consideration for the return of all moneys of the said City of Yonkers, the said City returned to the Conservator of the First National Bank and Trust 63
Company bonds owned by the said Bank in the sum of $535,000.00 and were returned to the said Bank in full satisfaction and discharge of any claim of the plaintiff in the complaint mentioned and in view of all demands to that date.

As to the third, separate and complete defense to the second cause of action, the defendants further allege:

Thirty-first.—That on or about the 2nd day of May, 1933, Percival W. Trudeau, as Conservator of the First

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National Bank and Trust Company of Yonkers, in consideration of the return of securities held by the City of Yonkers in the sum of $535,000.00, released the deposits of the said City of Yonkers, and that the said release of the deposits constituted a release of the defendant of and from all liability to the plaintiff for any and all claims of the plaintiff, Bank, against the defendant, City of Yonkers, concluding the alleged cause of action set forth in the complaint and against any and all claim in regard to said deposit which might thereafter arise against the defendant
65 for and on account of anything done by the defendant prior to the date of the release of said moneys.

As to the fourth, separate and complete defense to the second cause of action, the defendants further allege:

Thirty-second.—That the aforesaid payments to the City of Yonkers of its deposits were voluntary payments, and at the time of said payments, the First National Bank and Trust Company of Yonkers was not insolvent.

66

AS TO THE THIRD CAUSE OF ACTION.

Thirty-third.—Admits each and every allegation of said complaint numbered "Eighteenth" except denies any knowledge or information sufficient to form a belief as to allegations contained in sub-paragraphs numbered "Third" and "Seventh".

Thirty-fourth.—Admits each and every allegation of said complaint numbered "Twentieth" except denies that the said pledge of assets to secure the repayment of the indebtedness evidenced by the deposit account maintained

Answer as Amended by Stipulation, Dated November 23, 1937.

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by the defendant was unlawful, illegal, *ultra vires*, or null and void.

Thirty-fifth.—Denies each and every allegation of said complaint numbered "Twenty-second", "Twenty-third" and "Twenty-fourth".

As to the First Separate and Complete Defense to the Third cause of Action, the Defendants Further Allege:

68

Thirty-sixth.—That upon information and belief that on or before the 4th day of March, 1933, the First National Bank and Trust Company of Yonkers had the authority to pledge its assets to secure public money in the State of New York.

Thirty-seventh.—That prior to the 3rd day of March, 1933, the said First National Bank and Trust Company of Yonkers pledged certain securities with the City of Yonkers as Security for the repayment of its deposits by the said bank, as more clearly shown by plaintiff's "Exhibit A", except as hereinbefore denied.

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Thirty-eighth.—That the said deposit of the City of Yonkers was a public fund of the said City.

As to the Second Separate and Complete Defense to the Third cause of Action, the Defendants Further Allege:

Thirty-ninth.—That upon information and belief that on or about the 4th day of March, 1933, the City of Yonkers held as security for its deposits negotiable bonds in the

70 *Answer as Amended by Stipulation, Dated November 23, 1937.*

sum of $535,000.00, of the First National Bank and Trust Company of Yonkers.

Fortieth.—That upon information and belief that prior to the 2nd day of May, 1933, Percival W. Trudeau, as Conservator of the First National Bank and Trust Company of Yonkers, voluntarily released all moneys of the said City of Yonkers to the said City.

Forty-first.—That upon information and belief the said release of said City's deposits was made pursuant to in-
71 structions of the Comptroller of Currency of the United States or his deputies.

Forty-second.—That upon information and belief that said City deposits were released only after an opinion was given to the Conservator, Percival W. Trudeau, by his attorney.

Forty-third.—That the said City of Yonkers relying upon the voluntary return of all moneys of the said City surrendered to the Conservator of the First National Bank and Trust Company of Yonkers the aforesaid securities in the sum of $535,000.

72 *Forty-fourth.*—That the said payment by the Conservator and his successor was voluntary and without duress or fraud, and cannot be recovered back.

Forty-fifth.—That in consideration for the return of all moneys of the said City of Yonkers, the said City returned to the Conservator of the First National Bank and Trust Company bonds owned by the said Bank in the sum of $535,000.00 and were returned to the said Bank in full satisfaction and discharge of any claim of the plaintiff in the complaint mentioned and in view of all demands to that date.

Answer as Amended by Stipulation, Dated November 23, 1937.

As to a Third, Separate and Complete Defense to the Third cause of Action, the Defendants Further Allege:

Forty-sixth:—That on or about the 2nd day of May, 1933, Percival W. Trudeau, as Conservator of the First National Bank and Trust Company of Yonkers, in consideration of the return of securities held by the City of Yonkers in the sum of $535,000.00, released the deposits of the said City of Yonkers, and that the said release of the deposits constituted a release of the defendant of and from all liability to the plaintiff for any and all claims of the plaintiff, Bank, against the defendant, City of Yonkers, concluding the alleged cause of action set forth in the complaint and against any and all claim in regard to said deposit which might thereafter arise against the defendant for and on account of anything done by the defendant prior to the date of the release of said moneys.

As to a Fourth, Separate and Complete Defense to the Third cause of Action, the Defendants Further Allege:

Forty-seventh:—That the aforesaid payments to the City of Yonkers of its deposits were voluntary payments, and at the time of said payments, the First National Bank and Trust Company of Yonkers was not insolvent.

WHEREFORE, Defendant demands judgment dismissing the complaint as to the First, Second and Third Causes of Action together with costs and disbursements of this action.

LEONARD G. McANENY,
Corporation Counsel,
Attorney for Defendant,
City Hall, Yonkers, New York.

(Duly verified by Joseph F. Loehr, on July 18, 1936.)

Stipulation Amending Complaint and Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

against

THE CITY OF YONKERS,
Defendant.

L. 64-51.

The attorney for the plaintiff hereby consents to the motion made by the defendant dated November 22, 1937, to amend the defendant's answer by inserting and including in said answer a paragraph as follows:

> 'Fourth—A: Denies each and every allegation contained in the paragraphs of the complaint numbered "Sixth", "Fourteenth" and "Twenty-first".'

The attorney for the defendant stipulates and agrees that in consideration of the above consent by the attorney for the plaintiff that the plaintiff may, upon the trial of this action, present proof that the payments referred to in paragraphs numbered "Sixth", "Fourteenth" and "Twenty-first" of the complaint occurred from and after the 3rd day of March, 1933, and said Complaint and Answer are hereby deemed to have been amended accordingly.

Dated, November 23, 1937.

BENJAMIN W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Attorney for Defendant.

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Bill of Exceptions.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

vs.

THE CITY OF YONKERS,
Defendant.

L. 64-51.

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BE IT REMEMBERED that at a stated term of the District Court of the United States for the Southern District of New York, on January 5 and 6, 1938, before the Honorable John Knight, United States District Judge for the Western District of New York, then sitting in and for the Southern District of New York, presiding, the following proceedings were had:

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Appearances:

BENJAMIN W. MOORE, Esq., and MILTON L. ROMM, Esq., Attorneys and Counsel for Plaintiff.

LEONARD G. MCANENY, Esq., Corporation Counsel of the City of Yonkers, MORRIS ROSENWASSER, Esq., First Assistant Corporation Counsel, and HAROLD T. GARRITY, Esq., Assistant Corporation Counsel, Attorneys and Counsel for Defendant.

Mr. Moore: The jury is waived.

82 *Walter F. Downey, Plaintiff—Direct.*

The Court: The stenographer will note the stipulation then.

Mr. Moore: We talked this matter over during the intermission and we have come to the conclusion that with your consent that we put Mr. Downey on this afternoon and then adjourn to permit Mr. Power to go to the City Hall in the City of Yonkers with these checks and work with a man from the Comptroller's office that we will be able to do it much more expeditiously tomorrow. If it meets with the ap-
83 proval of the Court, we will call Mr. Downey and complete his testimony and then we will call it a day.

The Court: All right.

WALTER F. DOWNEY, the plaintiff herein, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Mr. Moore: I offer in evidence a certified copy of
84 the appointment of Percival W. Trudeau as Conservator of the bank.

Mr. McAneny: I object to this document as incompetent, irrelevant and immaterial and not binding on the defendant and that the proof as to the matters alleged in the complaint would require the production of Mr. Trudeau so as to permit him to be cross examined as to matters within his knowledge, because the defendant does not admit in any way the insolvency of the plaintiff banking institution. The defendant holds that it is incumbent upon the plaintiff in this proceeding to prove insolvency and that this documentary evidence is no proof of such in-

solvency in any sense binding on the plaintiff, and therefore it is incompetent, irrelevant and immaterial and certainly if such evidence, if not connected by further evidence in the case, as must be construed, so far as this defendant is concerned, as a self-serving declaration.

The Court: I see this third paragraph of the complaint is denied here, where it was not before.

Mr. Moore: That is right. That is part of the answer.

The Court: I think it is competent anyway as part of the proof. Anyway, I will overrule the objection. You have two or three certificates? 86

Mr. Moore: Yes. I offer the appointment of Louis B. Rossire and the appointment of Arthur E. Muth as Receiver.

Mr. McAneny: The first two are subject to the same objection. As to Mr. Muth's appointment, we do not raise any questions.

(Marked Plaintiff's Exhibits Nos. 1, 2, 3 and 4.)

The Court: As to the certified copy of the appointment of Mr. Muth, no objection is made, as I understand it. 87

Mr. McAneny: That is correct.

The Court: As to the others, the defendant objects, and the objection is overruled and an exception is allowed to the defendant.

How about Mr. Downey's appointment?

Mr. McAneny: I have no objection to that.

Q. Mr. Downey, have you qualified as receiver of the First National Bank and Trust Company of Yonkers, New York? A. Yes.

Q. Are you now acting as such receiver? A. Yes.

88 *Walter F. Downey, Plaintiff—Cross:*

Q. Are you in charge of the liquidation of the First National Bank and Trust Company of Yonkers? A. Yes.

Q. Was the first dividend of 40 per cent made available to the general depositors on December 16, 1933? A. Yes.

Q. Was a second dividend of 10 per cent made available to the general depositors on November 3, 1937? A. Yes.

Mr. Moore: That is all.

Cross examination by Mr. McAneny:

89 Q. Mr. Downey, you had no connection with the First National Bank and Trust Company prior to the date of your appointment as receiver, did you? A. Not directly with it.

Q. Not in the City of Yonkers, did you? A. No. In my position in Washington as personnel officer I came in contact with the affairs of other receiverships, also including examinations by receivership examiners and the reports, including confidential sections of these reports that crossed over my desk. Other than that, prior to my appointment as receiver I had no knowledge of the affairs of the First National Bank and Trust Company of Yonkers.

90 Q. This statement you made with regard to dates are from your reading of the records of the bank? A. Gained from reading the records and correspondence of the receivership.

Mr. McAneny: That is all.

Mr. Moore: That is all. Can we have the adjournment now?

The Court: Yes.

Mr. Moore: I think we will save a lot of time by doing so.

The Court: We will adjourn now until tomorrow morning at half-past ten.

(Adjourned to January 6, 1938 at 10:30 a. m.)

New York, January 6, 1938; 10:30 a. m.

TRIAL RESUMED.

JOHN B. POWER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Q. What is your present employment? A. I am a clerk in the employ of the Receiver of the First National Bank and Trust Company of Yonkers, in Liquidation.

92 Q. Were you an employee of the First National Bank and Trust Company of Yonkers, the old First National Bank and Trust Company of Yonkers? A. Yes.

Q. For how long? A. Since October 1, 1929.

Q. What position did you hold there? A. Assistant cashier.

Q. Did you continue in the employ of the Conservators and Receivers? A. Yes, sir.

Q. Do you recall March 4, 1933? A. Yes.

Q. What day of the week was that? A. Saturday.

Q. Was the bank open for any kind of business on that day? A. No.

93 Mr. McAneny: I object to that on the ground that the witness is not qualified, not being an officer of the institution and not being otherwise qualified to answer that question, and that the question calls for a conclusion of the witness, and that it is incompetent, irrelevant and immaterial, and the answer could not be binding on the defendant.

The Court: He can show what position he held.

Mr. Moore: He was assistant cashier on that day, in the employ of the bank.

The Court: He was an assistant cashier, and did some work there?

94 *John B. Power, for Plaintiff—Direct.*

Mr. Moore: Yes.

The Witness: Yes.

The Court: You can show where he was on March 4th.

Q. Where were you on March 4th? A. In the bank.

Q. Was the bank open for any kind of business on that day?

Mr. McAneny: I object to the question as calling for a conclusion. He can state whether business was
95 done and what business was done, if he has knowledge of it.

The Court: I assume this calls for his personal knowledge.

Mr. McAneny: And I object to it, your Honor, as the wording of the question is whether the bank was open for business. That calls for a legal conclusion.

Mr. Moore: It does not. He would know whether the bank is closed or whether the bank is open.

Mr. McAneny: I object.

The Court: I think it is a statement of fact. Ob-
96 jection overruled; exception to the defendant.

Q. Was the bank open for any kind of business on that day? A. No.

Mr. Moore: I want to offer in evidence a copy of the Proclamation of the Governor of the State of New York closing all banks of the State on March 4, 1933 and the further Proclamation of March 6, 1933.

Mr. McAneny: I object to the characterization of it being a proclamation. I think whatever they are must appear on the face of them.

The Court: I think it shows for itself, and I will permit it. The paper shows for itself. I do not think the characterization makes any difference.

(Marked Plaintiff's Exhibits Nos. 5 and 6.)

Q. Mr. Power, did the bank ever again open for regular business?

Mr. McAneny: I object to that upon the same ground, as calling for a conclusion. The witness is not qualified, and it does not ask for a statement of fact. 98

The Court: I do not know whether he has been employed there continuously since that time.

Mr. Moore: Yes, he said he had been employed by the bank and then by the conservators.

The Court: Overruled.

Mr. McAneny: Exception.

The Witness: The question again, please?

Q. Did the bank ever again reopen for regular business? A. No.

Q. I show you a book open at a certain page and ask you what this book is. A. This is the deposit record of the 99 First National Bank and Trust Company showing the account of the Treasurer of the City of Yonkers.

Mr. Moore: May I have it marked for identification?

(Marked Plaintiff's Exhibit No. 7 for identification.)

The Court: Were Exhibits 1, 2, 3 and 4 marked for identification or in evidence?

Mr. Moore: No, they were marked in evidence. They were the appointments of the two conservators.

Q. I show you another book opened at a certain page and ask you what that is. A. Deposit ledger of the First National Bank and Trust Company of Yonkers, showing the account of the Treasurer of the City of Yonkers.

Mr. Moore: I ask to have that marked for identification.

(Marked Plaintiff's Exhibit No. 8 for identification.)

Q. Were Plaintiff's Exhibits 7 and 8 marked for identification records made in the regular course of the bank's business? A. Yes.

Q. Was it the regular course of the bank's business to have those records made on the day when the transactions described in them occurred? A. Yes.

Mr. Moore: I offer these in evidence.

The Court: Received.

(Plaintiff's Exhibits Nos. 7 and 8 for identification received in evidence.)

Q. What pages are you referring to there? A. The pages are not marked.

Q. The page marked "Treasurer of the City of Yonkers"? A. Yes.

Mr. Romm: From what date on, where it is marked in evidence?

The Witness: Exhibit 8 is July 3, 1933 through to September 6, 1933, inclusive.

Mr. McAneny: I would like to make an objection to the introduction of these exhibits on the ground that they are not properly proved and that the witness has not testified that he made the entries or that he kept these books.

The Court: They have already been received, Mr. McAneny, without objection.

Mr. McAneny: I thought they were looking them over to identify what portion they wanted to put in.

The Court: They were marked and received, were they not?

The Clerk of the Court: Yes, sir.

Mr. McAneny: Will your Honor note my objection because I understood they were just reading them over preparatory to offering them.

The Court: They were offered and received, but 104
I will let you move to strike them out.

Mr. McAneny: I move to strike them out.

The Court: Now your objection.

Mr. McAneny: I move to strike the exhibits out on the ground that I stated.

The Court: I will grant it for the present. Do you want to make an objection?

Mr. Moore: He is making an objection.

The Court: I understand that.

Mr. McAneny: I object to the reception of these books or those portions of the books in evidence on the ground stated.

The Court: You were present in the bank; you 105
were in the bank during the period covered by these ledgers, were you?

The Witness: Yes, sir.

The Court: All these books were kept in the bank?

The Witness: Yes, your Honor.

The Court: As part of the records or transactions in the bank?

The Witness: Yes, your Honor.

The Court: Objection overruled.

Mr. McAneny: We except.

Mr. Moore:

Q. I show you another book opened at a certain page, marked "City of Yonkers," and ask you if you can tell us what that is. A. That is the deposit account of the First National Bank and Trust Company of Yonkers, New York, showing the account of the City of Yonkers.

Mr. Moore: I want to have it marked for identification.

(Marked Plaintiff's Exhibit No. 9 for identification.)

Q. Was Plaintiff's Exhibit No. 9 marked for identification a record made in the regular course of the bank's business? A. Yes.

Q. Was it the regular course of the bank's business to have those records made on the day when the transactions described in them occurred? A. Yes.

Mr. Moore: I offer it in evidence.

Mr. McAneny: I object to the reception of this book or these papers in evidence upon the same ground as I just stated.

The Court: Overruled; exception for the defendant.

Mr. McAneny: Exception.

(Plaintiff's Exhibit No. 9 for identification received in evidence.)

Q. I show you another book, Mr. Power, and I ask you to look at a certain page and ask you what that page indicates?

Mr. McAneny: The same objection. I would like to note an objection with regard to these questions

on the ground that the witness is not qualified and the answers are not binding upon the defendant.

The Court: Overruled.

Mr. McAneny: Exception.

A. Depositors account in the First National Bank and Trust Company of Yonkers, showing the account of the Nepperhan Sewer Fund of the City of Yonkers.

Mr. Moore: I ask to have that marked for identification.

(Marked Plaintiff's Exhibit 10 for identification.)

Q. Was plaintiff's Exhibit 10 marked for identification a record made in the regular course of the bank's business? A. Yes.

Q. Was it the regular course of the bank's business to have these records made on the day when the transactions described in them occurred? A. Yes.

Mr. Moore: I offer the book in evidence.

Mr. Garity: Which one?

Mr. Moore: Exhibit marked 10 for identification, the Nepperhan Sewer Fund account.

Mr. Garrity: I make the same objection to the reception of Exhibit 10 for identification.

The Court: Same ruling.

Mr. Garrity: Exception.

(Plaintiff's Exhibit No. 10 for identification received in evidence.)

Mr. McAneny: Will the Court permit a recess of five minutes so we can look over these books?

The Court: Yes, certainly.

(Short informal recess.)

112 *John B. Power, for Plaintiff—Cross.*

Mr. McAneny: I ask counsel for the plaintiff whether he will concede that the moneys covered by Plaintiff's Exhibits 7 and 8 were public moneys of the City of Yonkers?

Mr. Moore: I am not willing to concede it further than it is stated in the complaint. The money belongs to the City of Yonkers.

Cross examination by Mr. McAneny:

Q. Mr. Power, will you take Plaintiff's Exhibit 7? Will
113 you tell me the inclusive dates which are included in the exhibit offered by the plaintiff? A. March 8, 1933 to July 1, 1933, inclusive.

Q. Will you give me the same dates for Plaintiff's Exhibit 8? A. July 3, 1933 to September 6, 1933, inclusive.

Q. And the same dates for Plaintiff's Exhibit 9? A. May 25, 1932 to July 21, 1933, inclusive.

Q. May 25, 1932 to July 21, 1933? A. That is right.

Q. What are the entries in that book subsequent to March 3, 1933? A. Debit entries.

Q. Does that book indicate a balance as of that date? A. As of what date?

Q. March 3, 1933. A. It does.

114 Q. What is that? A. $1,502.84.

Q. Then it indicates debit entries against that account subsequent to that date; is that so? A. Yes.

Q. Will you tell me how those accounts are captioned in those three exhibits? That is, Exhibit 7, for instance, how is that captioned? A. Treasurer of the City of Yonkers.

Q. Does that book indicate a balance as of March 3, 1933? A. Yes.

Q. What does that show? A. $280,545.24.

Q. Does that indicate any subsequent entries? A. Yes.

Q. What is that? A. On March 11, 1933, $29.60.

115

Q. Deposited in that account? A. Yes.

Q. Any others? A. Yes.

Q. What is that? A. On March 20, 1933, $31.99, with a line drawn through it.

On March 25th, $6.93, with a line drawn through it.

On March 25, 1933, $45.60, with a line drawn through it.

On March 27th, $39.70.

On March 20th, $39.00.

On March 25th, 7 cents.

On April 1st, $30.10, with a line drawn through it.

Q. Are those entries all in 1933? A. That is correct.

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On April 1st, $233.14, $96.38, $108.75, $96.65, all with lines drawn through them.

On April 4th, $104.36, with a line drawn through it.

On April 7th, $29.35, with a line drawn through it.

On April 8th, $25.00, $27.25, $20.27; all with lines drawn through them.

On June 10th, I cannot make out the amount, there is a line drawn through it, so I cannot make out the amount.

April 24th, 2 cents, with a line drawn through it. That is all.

Q. That is Exhibit 7. Will you now take up Plaintiff's Exhibit 8, Mr. Power, and tell me how that is captioned?

117

A. Treasurer of the City of Yonkers.

Q. Does that book indicate a balance as of March 3, 1933? A. Yes.

Q. Will you state what it indicates? A. $753.61.

Q. Were there any deposit items subsequent to that date in that account? A. Not a deposit column. There are figures in pencil, the figures are through it, so I cannot read the amount.

Q. There is an ink written figure? A. Not an ink written figures, machine figure.

Q. The pencil figures are written through it? A. Yes.

Q. Under what date is that? A. July 28, 1933.

118 *John B. Power, for Plaintiff—Cross.*

Q. Will you take up Plaintiff's Exhibit 9 and tell me how that is captioned? A. City of Yonkers.

Q. Does that indicate a balance as of March 3, 1933? A. Yes.

Q. What is that? A. $1,502.84.

Q. Does that indicate any deposits entered subsequent to that date? A. No.

Q. Can you state why there were two accounts covered by Exhibits 7 and 8? Why there were two accounts covered by Exhibits 7 and 8 and the second count by Exhibit 9? 119 One account covered by two exhibits and the second account covered by Exhibit 9? A. A continuation.

The Court: 8 is a continuation of 7?

The Witness: 7 and 8 were continuations, same accounts continued.

Q. In all three exhibits? A. No, two exhibits. You are asking about 7 and 8.

Q. 7 and 8 was continued? A. Yes.

Q. You have Exhibit 9, which is another account? A. That is correct.

Q. Can you explain why there were two accounts? A. 120 These account are carried in the Yonkers Trust Company.

Q. Which is that, Exhibit 9? A. Exhibit 9.

Q. Then the Yonkers Trust Company was merged with the First National Bank and became the First National Bank and Trust Company; is that a fact? A. That is right.

Q. And also the Bryn Mawr-Nepperhan Trust Company was merged with the other? A. Yes.

Q. And became the First National Bank and Trust Company? A. Yes.

Q. The First National Bank and Trust Company then carried over those accounts as its accounts, as shown by Plaintiff's Exhibit 9; is that right? A. Yes.

The Court: Is the balance of Exhibit 9 carried into Exhibit 7?

The Witness: No.

Q. As I understand it, they were carried separately, but they were both carried in the books in the First National Bank and Trust Company as regular accounts, were they not? A. Yes.

Q. You have stated that you were familiar with the keeping of these books and the making of these entries, and I ask you to refer to that balance as of March 3, 1933, indicated in Plaintiff's Exhibit 7, and I would like to have you 122
tell me by whom the deposits represented in that figure were made? A. I do not know.

Q. Do you know from what source the money came for the making of these deposits? A. No.

Q. Would there be anybody connected with the First National Bank and Trust Company that would know that? A. I do not know.

Q. Who kept those three books? A. I do not know.

Q. Could you tell me any one of a number of persons that might have kept them? A. Yes.

Q. Will you state that? A. Miss Lucy Cochrane may
have kept them. 123

Q. Is she still with the bank? A. Not with the First National Bank and Trust Company.

Q. Who is she with now? A. The First National Bank in Yonkers.

Q. That is in the same building, is it not, as the building in which you are working? A. Yes.

Q. Who is the other party? A. Miss Reilly, Miss Muriel Reilly.

Q. Was Miss Cochrane a bookkeeper? A. I believe she was.

Q. She was under your charge? A. She was under the charge of the head of the bookkeeping department

124 Q. Do you know what position she occupied or what kind of duties she performed? A. I said I believed at the time she was a bookkeeper.

Q. But you do not know? A. I do not remember now, no.

Q. Who was the second person you mentioned? A. Miss Muriel Reilly.

Q. Is she with the First National Bank and Trust Company now? A. No.

Q. Where is she? A. I do not know.

Q. Was she a bookkeeper? A. I believe she was.

125 Q. Are you positive? A. No.

Q. Was there another person that might have kept those books? A. There was a Miss Muriel Woodruff.

Q. Is she with the First National Bank and Trust Company? A. No.

Q. Do you know where she is now? A. First National Bank in Yonkers.

Q. That is in the same building? A. Yes.

Q. She was a bookkeeper? A. Yes.

Q. Were there any other persons that might have kept those books? A. I do not remember now.

Q. Didn't you mention the name of a man yesterday in 126 your testimony in another case? A. I said he had charge of the bookkeeping department.

Q. What is his name? A. Mr. Louis Spyce.

Q. He had immediate charge of the bookkeeping department? A. Yes.

Q. And also charge of these books that are now in evidence; is that right? A. That is right.

Q. Where is he now? A. First National Bank in Yonkers.

Q. That is in the same building as the one you are working in? A. Yes.

Q. None of these people are in court, are they? A. No.

Q. On all of these accounts as indicated by these books that have been put in evidence, Plaintiff's Exhibits 7, 8 and 9, how were the debit entries made? What was the original source of those entries? A. From checks.

Q. I show you a number of checks and I ask you if you have examined all of those checks?

The Court: A concession might obviate that.

Mr. McAneny: If your Honor please, he has already examined them.

The Witness: I have already examined them. 128

Mr. McAneny: He took quite a time last night to go over them.

The Witness: The answer to the question is that I have examined the checks.

Q. Are they the checks upon which the bank paid out moneys which appear as debit items in the accounts contained in Plaintiff's Exhibits 7 and 8? A. They are checks paid out by the bank.

Q. They are the checks upon which the bank made payment, from which the debit entries in Plaintiff's Exhibits 7 and 8 were made; is that correct? A. The checks paid 129 out by the bank similar to the account posted in the ledger. I cannot swear they are the same checks.

Q. Have you any doubt of it? A. I have no doubt of it.

The Court: Same amounts and same dates?

The Witness: That is right.

Q. Do those checks on the reverse side in every instance bear a stamp to indicate on what respective dates the bank paid out these moneys on this check? A. The majority of them do.

Q. Do you find any that do not so indicate? A. There are a few that do not indicate.

130 *John B. Power, for Plaintiff—Cross.*

Q. How many did you find that did not so indicate? A. I did not count them.

Q. And these checks which you say do not indicate on the reverse as to when they were paid by the bank, those checks, however, do correspond to the debit entries in the account? A. I did not correspond them with the ledgers.

Q. You just disregarded those; is that a fact? A. Yes, that is right.

Q. But those checks went through the bank, didn't they? A. Yes.

131 Q. Will you tell me what the inclusive dates of those checks are? What are the inclusive dates? A. I cannot answer that.

Q. How do they run? A. I cannot answer that.

Q. The checks would show that? A. Yes.

Q. But you have not examined them to that extent? A. No.

Mr. McAneny: I ask to have these two boxes containing these checks given numbers for identification to cover the checks in the box. In other words, to have the checks as indicated in the boxes indicated by one identification number.

132 The Court: Are you going to offer them in evidence?

Mr. McAneny: Yes, I would like to offer them in evidence.

The Court: Any objection?

Mr. Moore: There are 5,000 checks. I wish we could find some way to take a sample check at random out of the boxes.

Mr. McAneny: When it comes to presenting this evidence, I will present a tabulation for the purpose of reference. That could be submitted to you and we can both agree that is a tabulation of these checks.

133

The Court: Is there any question that the ledgers show these particular checks as drawn on the bank? Is there any disagreement as to that?

Mr. Moore: I do not think there is.

The Court: I had in mind that perhaps you could stipulate that the checks and these amounts shown in the ledger were drawn against those accounts.

Mr. McAneny: I would like to have the checks in evidence in the first instance and we can perhaps stipulate as to what amount to put in the record.

Mr. Moore: I do not want 5,000 checks in evi- 134
dence if I can avoid it.

Mr. McAneny: You will have to have them if they are relevant, and they are relevant.

Mr. Romm: May we question the witness as to those checks preliminary and offer any objection to them?

The Court: I do not see any objection to going ahead, if you have some questions.

Mr. McAneny: If you have any objection to them at this time, I will let you cross examine.

The Court: I will allow a preliminary question- 135
ing.

(Two boxes marked Defendant's Exhibits A and B for identification.)

By Mr. Romm:

Q. In your examination of these checks included in Defendant's Exhibits A and B for identification, did you check each check with an entry in the bank's ledger, being Plaintiff's Exhibits 7 and 8? A. No.

Q. Do you have any way of telling us unless you do that these checks represented by Defendant's Exhibits A and B marked for identification were actually cashed against the bank's account?

Mr. McAneny: If that is so, I will ask him to check them now. I thought that was what he took three hours for last night.

Mr. Romm: He did not do that.

The Court: I do not think we ought to bother about that.

Mr. Moore: There is no question about it.

The Court: The question is whether this is a public fund. It seems to me we ought to be able to stipulate certain things about which it seems to me there is no question of fact.

Mr. Moore: We allege in the complaint, if your Honor please, that the fund belongs to the City of Yonkers.

The Court: They make some distinction between belonging to and being a public fund. I think they are entitled to the ledger accounts and the checks, but at the same time I think we ought to be able to agree upon a stipulation which would cover all these facts in a few words. Is there any question, Mr. Moore, that these checks, Exhibits A and B for identification, are represented as shown in this ledger account as checks drawn against the Treasurer's account of the City of Yonkers?

Mr. Moore: None whatever.

The Court: Isn't that the answer?

Mr. McAneny: I would not be obliged to put this evidence in if plaintiff's counsel would concede that these represent public moneys. Otherwise I would have to go through a lot of proof.

The Court: He concedes that Exhibits A and B are shown in the ledger exhibits 7, 8 and 9 as drawn upon the accounts of the bank, drawn upon the bank by the department, and are checks issued by the Treasurer of the City of Yonkers.

Mr. Moore: I will concede that the account represented by Exhibits 7, 8 and 9 are public funds, if that is what Mr. McAneny wants.

Mr. McAneny: Will you further concede that these checks and all the debit entries referred to in Exhibits 7 and 8 were paid, were to pay payrolls of the City of Yonkers?

Mr. Moore: No, I won't concede that, your Honor.

Mr. McAneny: I will prove that in two minutes by the treasurer. I think you understand that.

140

Mr. Moore: I think it is incompetent, irrelevant and immaterial, if your Honor please. They are claiming this money because they claim——

Mr. McAneny: If counsel will concede that, then I am through with this witness.

The Court: He concedes that those were public funds. Isn't that sufficient? What difference does it make whether they are to pay payrolls or drawn to pay some other accounts against the City?

Mr. McAneny: If your Honor please, I feel this way: That the character of these payments by the bank constitutes a question in this case. In other words, that these moneys were paid out by the bank to these various individuals in these checks, and I think we have a right to show that transaction.

141

The Court: That is all with this witness?

Mr. McAneny: Yes.

(Witness excused.)

142 *Carl H. Vanvick, for Plaintiff—Direct.*

CARL H. VANVICK, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Q. Are you an employee of Walter F. Downey, the Receiver of the First National Bank and Trust Company of Yonkers, New York? A. I am.

Q. In what capacity? A. Auditor in charge of the books and records and matters pertaining to the claims.

Q. How long have you been auditor in the receivership?
143 A. Since April 16, 1934.

Q. What has been your experience as an auditor? A. I have had approximately 14 years of banking experience. I have set up seven receivership books. The bank I worked in before it closed employed me as auditor for approximately a year before closing.

Q. Just recite what you have done similar to what you recited in the other cases. A. I was employed by the Sioux City National Bank of Sioux City, Iowa from 1923 to 1930 in various capacities, the last being an auditor and transit manager. I was employed by the receiver after its closing in 1930 for a year and a half, had charge of his books and
144 records. He was transferred to New Haven in 1932 and I accompanied him as auditor, setting up his records and had charge of them; employed by the National Trademan's Bank & Trust Company of New Haven for approximately a year. From there I went to Washington and was employed by the Comptroller in his office for two months, and in October, 1933 he sent me to Grand Rapids, Michigan, for the purpose of setting up the Receiver's books of the Grand Rapids National Bank of Grand Rapids, Michigan. I was engaged in that receivership for four months, and the Comptroller sent me into the State of Vermont for the purpose of setting up four receivership books in that state.

I was in the State of Vermont from January, 1934 to April 15, 1934, when I was transferred to Yonkers.

Q. You have been there since? A. Yes.

Q. Are you familiar with the ledger records of the bank in Yonkers? A. Yes.

Q. As of what time were the claims of general depositors calculated and allowed? A. March 3, 1933.

Q. As of what time were set-offs calculated and allowed? A. March 3, 1933.

Q. Up to what time was interest on interest-bearing deposits allowed? A. March 3, 1933. 146

Q. That means including March 3rd? A. Including it.

Q. Do the bank records show deposits maintained under the caption of the Treasurer of the City of Yonkers? A. Yes.

Q. What was the balance, together with the accrued interest, on March 4, 1933? A. The ledger shows a balance of $275,807.96, but I believe the true balance on the close of business March——

Mr. McAneny: I object to his stating "on the close of business."

The Court: March 3rd. State without reference to the close of business. 147

The Witness: It is as of March 4th.

The Court: What do you wish to say?

The Witness: It should be $275,105.53, because there are several entries after March 4th, dated March 3rd. There is no business transacted on the 4th. It would be my opinion that those entries there constitute checks which were cashed in the evening of March 3rd.

Q. When did the first entries occur after March 4, 1933? A. The records show two withdrawals on March 8, 1933.

Q. How much was withdrawn from the account on March 8th? A. $16.

148 *Carl H. Vanvick, for Plaintiff—Direct.*

Q. What is the interest which you have computed on that account? I mean on the withdrawal? A. $3.06.

Q. What basis did you compute the interest on? A. 6 per cent on the total withdrawal of $16 from March 8, 1933 to December 16, 1933; then on 60 per cent of the withdrawal or $9.60 from December 16, 1933 to November 3, 1937; then 50 per cent of the withdrawal or $8 from November 3, 1937 to January 3, 1938.

Q. Have you used the same basis in all of your interest calculations? A. Yes, sir.

149 Q. When did the next withdrawal from the account occur? A. March 9, 1933.

Q. What is your computation of interest on that withdrawal? A. The total withdrawals were $57.26; the interest is computed to be $10.94.

Q. When did the next withdrawal occur? A. March 10, 1933.

Q. How much was withdrawn from the account on that date? A. $14,044.78.

Q. What is your computation of interest on that withdrawal? A. $2,682.04.

Q. Have you computed all of the withdrawals that have been made from time to time until the account was closed
150 out? A. Yes. There is still a balance in the account. I computed the interest on all the withdrawals that were made.

Q. On all of the withdrawals. Now state the withdrawals that have been made and the interest you computed on the amount of the claim. Will you do that? A. Each daily withdrawal?

Q. Yes.

The Court: The total.

Mr. Moore: He can make the totals, if he wants to.

The Court: Are they few or numerous?

The Witness: 85 entries.

Mr. Moore: There are 85 entries. He can make the entire total.

Mr. McAneny: That is incompetent, irrelevant and immaterial, not within the issues, and I object to it on that ground; and the further testimony on that ground, and if your Honor rules that the testimony should go in, I think that we ought to know the details of the calculations that the witness claims to have been made. The interest on every claim in this case is very considerable.

The Court: This is off the record. 152

(Discussion off the record.)

Mr. McAneny: Can it be taken that way, subject to my general exception?

The Court: Yes. Have you copies for counsel so he can be permitted to have them?

Mr. Moore: Yes.

The Witness: There are four of them.

The Court: You may examine him to make it competent.

Q. I just handed you a compilation of figures. Will you state what those figures are that you have just been 153 handed? A. This is set up by me as a computation of the interest calculated to be due on the account of the Treasurer of the City of Yonkers, showing the daily withdrawals, number of days prior to December 16, 1933; amount of daily withdrawals, amount on which interest is to be calculated at 6 per cent for one day, interest on 60 per cent of the daily withdrawals from 12/16/33 to 11/3/37; amount on daily basis, interest on 50 per cent of the daily withdrawals; that is, from 11/3/37 to 12/31/37, amount on daily basis, interest from 12/31/37 to date of trial, amount on daily basis, interest, aggregate amount of interest due.

Mr. Moore: I offer this in evidence subject to any objection of Mr. McAneny after he has examined it.

Mr. McAneny: I take the same general exception on the ground it is incompetent, irrelevant and immaterial, not within the issues.

The Court: Your objection is not based on the ground that it is a hearsay document?

Mr. McAneny: No, not on that ground.

The Court: On the ground of immateriality of testimony?

Mr. McAneny: Yes.

The Court: I will receive it. It is subject to examination by counsel. This memorandum is made from the credits and deposits, from books and ledgers of the bank?

The Witness: That is right. It is the interest calculation on each daily withdrawal, with the dividends paid.

(Marked Plaintiff's Exhibit No. 11.)

The Court: Furnish a copy of that to the defendant.

Mr. Garrity: May we have a copy of that?

Mr. Moore: Yes, you may have a copy of it (handing to counsel). It is marked in evidence?

The Court: Yes, subject to any further examination by the defendant and a motion to strike out any part of it that may be found to be incompetent.

Mr. Garrity: Is that all of it?

Mr. Moore: This was offered in evidence, as I understand it, in substitution of his testimony that he would have given.

The Court: The question was asked whether that is all of it. Does that include the special accounts?

Mr. Moore: No, I am coming to the special accounts now and get those in.

Q. Do the bank's records show a deposit account maintained under the caption "City of Yonkers"? A. Yes.

Q. What was the balance, together with the accrued interest, on March 4, 1933? A. $1,502.84.

Q. When did the first withdrawal from the account occur after March 3, 1933? A. March 23, 1933.

Q. How much was withdrawn from the account on that date? A. $48.

Q. What is the interest on that withdrawal? A. I computed it to be $8.58.

Q. How did you compute it? What method did you compute it on? A. 6 per cent on the total amount of withdrawals from May 23, 1933 to December 16, 1933; then on 60 per cent of the withdrawals, or $28.80, from December 16, 1933 to 11/3/37; then 50 per cent of the withdrawal, or $24, from 11/3/37 to 1/3/38. 158

Q. Have you used the same basis in all of your interest calculations? A. Yes, sir.

Q. I show you a paper here and I ask you to tell me what it is.

Mr. Garrity: May I see the original of Exhibit 11?

Q. What is the paper you hold in your hand? A. It is a carbon copy of a typewritten schedule that I prepared relative to my computation of interest on the City of Yonkers account. 159

Q. Does it contemplate or take in all of the withdrawals that have been made from that account? A. Yes.

Q. Will you tell us what this paper shows and what element you took into consideration in arriving at your results? A. It shows the date of the withdrawal; number of days prior to 12/16/37; amount of daily withdrawals; amount on which interest is to be calculated at 6 per cent for one day; interest on 60 per cent of the daily withdrawals from 12/16/33 to 11/3/37; amount on daily basis, interest on 50

per cent of the withdrawals, that is, from 11/3/37 to 12/31/37; amount on daily basis of interest, that is, from 12/31/37 to date of trial; amount on daily basis of interest; aggregate amount of interest due.

Mr. Moore: I offer that in evidence, your Honor.

Mr. McAneny: I make the same general objection.

The Court: The objection is not made on the ground it is not the best evidence, but on the ground it is incompetent?

Mr. McAneny: That is right.

The Court: Received.

Mr. McAneny: Exception.

(Marked Plaintiff's Exhibit No. 12.)

The Court: That is called the City of Yonkers account, is it?

The Witness: Yes.

Q. Mr. Vanvick, do the bank records show a deposit maintained under the caption of Nepperhan Sewer Fund? A. Yes, it is captioned Nepperhan Sewer Fund, City of Yonkers, care of City Treasurer, City Hall, Yonkers, New York.

Q. What was the balance, together with the accrued interest, on March 4, 1933? A. $621.88.

Q. When did the first withdrawal from the account occur after March 4, 1933? A. On May 4, 1933.

Q. What was the amount of that withdrawal? A. $621.88.

Q. Have you computed the interest on that money? A. Yes.

Q. Will you give us your computations on that and tell us how you arrived at it?

Mr. McAneny: I make the same general objection as being incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. McAneny: Exception.

A. I computed the interest to be $113.14, and arrived at it by taking the total withdrawal of $621.88 at 6 per cent from May 4, 1933 to December 16, 1933; then on 50 per cent of the withdrawals, or the amount of $373.13, from December 16, 1933 to November 3, 1937; then on 50 per cent of the withdrawals, or the amount of $310.94, from November 3, 1937 to January 3, 1938.

Mr. Moore: Exhibits 11 and 12, which we have had 164
marked in evidence, are carbon copies. I just found the originals. If you will exchange those for the carbon copies, I would like to have that done.

The Court: Yes.

Mr. McAneny: This is 11 and this is 12.

Mr. Moore: That is all the direct examination at this time.

Cross examination by Mr. McAneny:

Q. When you use the word "withdrawal," you mean moneys paid out by the bank on these various checks that are included in defendant's exhibits for identification? A. 165
I would say checks from debit items against the account in the usual form of bookkeeping in the bank.

Q. Didn't you check and go over the checks that have been produced in court this morning? A. Part of them.

Q. Didn't you go over all of them? A. Not all of them.

Q. What did you check them against? A. I did not check the checks against anything. I just looked at the checks.

Q. Just looked at all the checks? A. Part of the checks; not all of the checks presented.

166 *Carl H. Vanvick, for Plaintiff—Re-direct.*

Q. Didn't I understand that you were going to look them over and check them against the debit items in the account? A. No.

Q. What was the purpose of your looking them over?

Mr. Moore: Mr. Power is the one that looked them over.

Mr. McAneny: This gentleman did, too.

Mr. Romm: He was not supposed to.

Q. What was your purpose in looking them over? A.
167 To see that all the checks were drawn to individuals.

Q. Did you so ascertain? A. All except a few that we took a record of.

Q. To whom were those drawn? A. The majority were New York State Employment Retirement Fund, City of Yonkers, Contributions to the Travelers Insurance Company and the Aetna Insurance Company.

Mr. McAneny: That is all.

Re-direct examination by Mr. Moore:

Q. Could you give us in the summary the total amount claimed due from the City of Yonkers on each of the
168 accounts of the Treasurer of the City of Yonkers, the City of Yonkers, and the Nepperhan Sewer Fund? A. Separately?

Q. Separately, yes. A. Treasurer of the City of Yonkers, the principal——

The Court: We just want the total, with interest.

Q. Yes, the total with interest. That is what I want. A. The total is $137,489.52, plus interest on $51,791.58.

Q. A total of how much? A. I can give you the total.

The Court: It is not necessary, yes.

A. (Continuing) Total of $189,281.10.

Q. Now as to the City of Yonkers account.

Mr. Garrity: What was that amount, please?

The Court: $189,281.10.

A. City of Yonkers, principal of $751.42; interest of $257.26; total of $1,008.68.

Nepperhan Sewer Fund, the principal claim is $310.94; interest, $113.12; a total of $424.06. 170

Q. Mr. Vanvick, from your examination of the books of the bank can you tell us whether any deposits were made in the Treasurer of the City of Yonkers account subsequent to March 3, 1933?

Mr. McAneny: I object to that question as calling for a conclusion of the witness. The checks speak for themselves. These entries are in the books. They are in evidence and speak for themselves.

The Court: I think it is competent. Has it not been already covered by the testimony of Mr. Power?

Mr. McAneny: I think it has, your Honor.

Mr. Moore: Perhaps it has. 171

The Court: Some things were marked out. I think Mr. Power testified to the amount of deposits subsequent to March 3rd.

Mr. Moore: I thought from his experience as an auditor, as having examined the books and gone over them, he could tell us whether any deposits had been made.

The Court: I will permit you to cover it. I thought it had been covered.

Mr. McAneny: Exception.

172 *Carl H. Vanvick, for Plaintiff—Re-direct.*

The Court: Does that appear on the records and ledgers?

Mr. Moore: Yes.

Mr. Romm: From certain entries in the deposit in such ledger. Do we understand that any more——

Mr. McAneny: I object to the statement of counsel characterizing any instance. The records speak for themselves.

Mr. Romm: Yes. They are in the deposits in 1933 and the bank closed. Let him bring the deposit books.

173 The Court: I think that is explanatory.

Mr. Romm: There were none.

Mr. McAneny: I object to these statements by counsel.

The Court: The witness is proceeding to examine the ledger.

Mr. McAneny: I ask that that be stricken from the record.

The Court: That may be stricken out. I do not think it is of any importance, Mr. McAneny. The Court will try to be controlled by the testimony, and not by the statements.

174 Mr. McAneny: I appreciate that, your Honor, and I apologize.

A. In Exhibit 7 there are various entries in the deposit column and all but three of them have been stricken out. I cannot say as a statement of fact as to whether they were deposits or not. I could render my opinion as to what happened.

Mr. McAneny: I object to his opinion unless he knows the facts.

The Court: Do you have any other records showing the disposition of the amount, as originally shown?

The Witness: The items. The amount of $233.14, which is shown in the deposit column on April 1, 1933, has a contra entry of $233.14, and the checks and detailed column the entry on the date of April 1, 1933 is stricken out, the amount is stricken out, and an arrow pointed to the deposit column.

The Court: What is the importance of this, Mr. Moore? What significance has this?

Mr. Moore: I know the bank was closed all that period of time. I want to know why——

Mr. McAneny: I do not think counsel can state he knew the bank was closed, on this record. The Judge asked you what was the importance of these entries. 176

Mr. Moore: He is the auditor there and he has found out if they were doing business during that time. They want to give the impression that deposits were being made at that time or down through the year.

Mr. McAneny: You say I want to give that impression.

Mr. Moore: No.

Mr. McAneny: I have done nothing but examine the checks and cross examined the witnesses, 177

Q. Do you find any cross-out entries in there of alleged deposits? A. One on April 4, 1933 in the amount of $104.36. There is the same amount found in both columns, and both amounts are stricken out by a pencil. On April 7, 1933, the same thing occurred on an amount of $29.35. On April 8th three deposit amounts were stricken out in pencil, but there are no amounts crossed out on the checks in detail.

Mr. Moore: That is all.

Mr. McAneny: That is all.

78 *Motion to Dismiss the Complaint.*

Mr. Moore: With the possible exception of another witness which I might want to call from Yonkers, at the afternoon session, the plaintiff rests.

Mr. McAneny: I move to dismiss the complaint upon the ground that the complaint itself does not state facts sufficient to constitute a cause of action; also on the ground that at the completion of the plaintiff's case the plaintiff has not produced facts sufficient to constitute a cause of action and does not make out a cause of action. I make this more particularly upon a number of grounds, the first of which 79 is that neither in the complaint itself nor in the proof has the plaintiff set up or proved any insolvency of the First National Bank and Trust Company at the time the bank made the payments on the checks which have been produced in this case and which are represented by debit items in the ledgers.

My motion is further made on the ground that the plaintiff has alleged in its complaint that to secure the accounts, the City accounts in this action, which are concededly public moneys, that the First National Bank and Trust Company deposited certain securities with the City of Yonkers, and the 80 plaintiff has alleged in its complaint that the deposit of such securities was ultra vires and null and void without, however, in the complaint stating no facts upon which that allegation of ultra vires and nullity is founded.

The plaintiff has not proved in this case that any such securities were delivered to the City of Yonkers at this stage of the case, and certainly has made no proof of the ultra vires with respect to any such securities.

Furthermore, upon the ground that the evidence discloses that the payment by the First National

Bank and Trust Company of these checks to various persons, checks issued by the City of Yonkers and covering the debit items in the ledgers were paid without question by the bank and paid, apparently, so far as this record goes, in the regular course of the bank's business; that the ledgers do indiacte that these payments were made without question, and they show that the concluded state of business is between the bank and the City.

Furthermore, the ledgers themselves disclose that subsequent to March 3, 1933, there were various deposit items shown in the books, so that the accounts themselves indicate that they were kept open.

I further move upon the ground that this action is brought against the City of Yonkers; that an action at law or in equity against a municipality or a city is based entirely upon permission of the law; in other words, that a city cannot be sued without the permission of the law, and that in this case the law, which I believe your Honor will take judicial notice of, the law of the State of New York, in Section 244 of the Second Class Cities Law and in Section 64 of the same law prescribes the requisites preliminary to the bringing of an action against a city.

There was no demand ever made upon the city for the return of any moneys. There was no demand whatsoever in the evidence. Furthermore, certainly there was no demand or claim ever filed against the city as required by the two sections of law that I have referred to. Unless an obligation is mandatory, unless it is required that the city make a payment under a contractual obligation or upon a salary or upon a payroll or some fixed charge which can be enforced by mandamus against the comptroller, the city is not liable on any account or any

claim unless a claim is filed with the city comptroller to cover it and either ordered accepted or take such action as required by provisions of Section 244 and Section 64 of the Second Class Cities Law.

It is quite evident in this case that the funds involved in this action are public moneys of the City of Yonkers, and it is so conceded on the record.

Section 90 of the National Banking Law permits national banks to accept such accounts and to carry such accounts and to give securities for such accounts. There is nothing in this record which would indicate that that law or any of the provisions of it have not been observed.

Upon all of those said grounds and further upon the general ground that the plaintiff has failed to make out a cause of action in this case, I ask that the complaint be dismissed.

And upon the further ground that under the decisions of the highest court of the State of New York with respect to public moneys and moneys for which pledges have been deposited by banks the depository is not permitted to recover securities without being paid back in full the amount of the deposit, where it refers to public moneys.

Upon all of those grounds I move that the complaint be dismissed.

The Court: Didn't they pay back in full the deposit here?

Mr. McAneny: They paid, and now they are trying to get that back.

The Court: I am inquiring about the last argument; that is all.

Mr. McAneny: Yes; that is true.

The Court: You said without return of the deposit.

Mr. McAneny: They complied with the practice, the practice and rules of the Court of Appeals of this State, and have gotten their security back and they are attempting to get the money.

The Court: I take it that that has certainly been done and that they were following the statute.

Mr. McAneny: What I mean to say is that the situation which is presented here is exactly as the courts of the State of New York have ruled should be the situation. In other words, that they have gotten their securities back and we have gotten our deposits back. We did not hypothecate the securities or hold them. I say it is the legal position of the City, and it is a position that cannot be assailed by an act of this kind. They have the securities back and after the return attempt to get the money back.

Mr. Romm: May it please the Court, I will respond but briefly to certain of the points raised by Mr. McAneny in connection with his motion to dismiss the complaint. As to the point that we have failed to prove as a matter of fact that the bank was insolvent, it is our position that in view of the bank's suspension and the appointment of a conservator and the subsequent appointment of a receiver with the power and duty of liquidation, as a matter of law that question of insolvency is one which the Court assumes from the situation, and if the City challenges that point as a matter of fact they must now come forward and prove that we were solvent rather than insolvent.

As to the point made that in our complaint no facts are alleged showing that the pledge was ultra vires, that there again the question is one of law and hence naturally the complaint which under the law merely submits a statement of fact, our com-

plaint does not set forth any fact because inevitably it could not do so, it being a question of law.

Section 244 of the Second Class Cities Law we believe applies only to cases known generally as negligence or trespass suits and does not apply to a case of this kind.

Section 64 of the Second Class Cities Law states merely that the comptroller of a city like Yonkers can pay no claims unless verified claims are filed with him by the claimant. Nowhere in Section 64 is there any requirement for the filing of a claim with a comptroller as a condition precedent to the commencement of the action.

Section 244, which applies only to trespass and negligence suits, specifically says you cannot sue a city unless you file a claim. Section 64 merely says how you shall file that claim and where. It does not say that if you want to sue on a claim you must first have filed it.

As to the question of demand, from the common law aspect, this being an action at law for money illegally received from the plaintiff, it is our position that we in fact do make a formal demand by the institution of an action. The service of the summons itself is sufficient demand for that purpose.

The Court: You allege it in there, a demand?

Mr. Romm: Yes.

The Court: Does the answer deny that?

Mr. Romm: Yes.

Mr. Garrity: Yes, your Honor.

Mr. Romm: As to the point raised by Mr. McAneny, namely, that under the law of New York, assuming that the pledge was *ultra vires*, that it was our duty to pay out the deposits and restore them to the City before getting the pledge back,

while that may be the common law of the State of New York, it is our position that the Federal law, which does not require the restoration of that account, is the one which governs and controls the disposition of the case before your Honor.

The Court: That is what was done in this case, the deposits were restored and returned?

Mr. Romm: Restored to the City, and we recovered the pledge. That is true. We claim that that payment to the City——

The Court: That is what the difference in your 194
two positions is with reference to that. You spoke about the New York law. What is that?

Mr. Romm: To qualify that point, your Honor, I will try to point out to you certain decisions which I am very sure your Honor is familiar with, one being the State Bank of Commerce *v.* Stone, a decision by the Court of Appeals of the state where it happened.

The Court held that the pledge being a matter of importance that to secure the private deposit was an important phase of it, that in order for the bank to recover the pledge of bonds back it must restore the depositor Stone to a status quo and pay him 195
out 100 cents on the dollar. If that were the law, which we believe should control in the case before your Honor, we practically state that we would probably be out of court, but we claim that that common law of New York——

The Court: How would you be out of court? I do not get the distinction there. In this case here you return the deposits and receive back your security.

Mr. Romm: That is true. It is a different situation from the Stone case.

The Court: How is there a different situation in the Stone case?

Mr. Romm: The parties got back what they originally had.

The Court: So you did here.

Mr. Romm: That is true. But the Federal rule as stated by the United States Supreme Court in a case involving the question which is now before your Honor, that Court has stated that the bank or receiver can recover back the amount paid out or recover back the bonds pledged with the depositor without restoring the deposit in full. But it is our position that that Federal rule is the one which controls in this case.

To qualify it further, it is our claim that assuming that the pledge which the bank gave to the city was *ultra vires*, then it follows that the deposit or the depositor, the city, was no more than a general depositor and as such is entitled to more than a general dividend.

Mr. McAneny: May I say just one word, your Honor? In the first place, with regard to the filing of a notice of claim against the City, the laws are very well developed with respect to the responsibility of a city. A city can only raise money by taxes. That is its sole source of revenue, and the laws provide that before the city shall be held liable in any respect—in the case of Thomann *v.* The City of Rochester, the Court of Appeals said that any claim at law or equity, said the claim must be given to the City unless it is a fixed charge, because they have the right to look into that claim and to settle it, if it is so advised. Every settlement that the City makes must go into the next annual budget and be taxed and paid in that way. There is no other way

for the City to raise money to pay judgments or settlements.

Here we have a situation where a number of years ago these moneys were paid out by the City for payrolls without any objection on the part of the plaintiff, and their security returned without any claim having been made to the Comptroller. In fact, he has never had the opportunity of examining them. The law says within 90 days after the act upon which the claim is based or the omission occurs the claim must be filed and the Comptroller has a right to examine the claims and get them in the next year's budget. Here is a claim that is three or four years old and was never added or put in the budget so they could get paid by the taxpayers in the next two or three years. The law contemplates that in this case the taxpayers should have the advantage of it and pay it in the next budget. It is designed to give the City the proper notice of claim. There has been absolutely no claim or demand made on the Comptroller for these moneys. In fact, an action was started. 200

In other court decisions of the Federal Court, in which cases the Federal Courts have made their determinations upon the practice and upon the conditions and upon the laws and other matters affecting the pledge of the person within the distinctive state. The opinions that Mr. Romm has referred to and the decisions affect only various states, but in the State of New York we have an absolutely different rule. In this case the Federal law and the Federal decisions would follow those of the State of New York. 201

Mr. Romm has mentioned a case which involved a private deposit. He did not mention it the other time, because the City of Mount Vernon *v.* The

Mount Vernon Trust Company, which was decided by the Court of Appeals within a very short time, only a year ago, and he failed to read that case correctly, because that case says it involves public moneys, and it says where public moneys are deposited with a bank and the bank gives security, the bank must repay those moneys before it can have a return of those securities. I would say that probably it might indicate that the bank could not hypothecate the securities again and demand the return together with the tender of the amount of deposits.

Mr. Romm: The Rochester case referred to by Mr. McAneny arose under a section of the Rochester City Charter which is very similar to Section 244 of the Second Class Cities Law. In other words, it is like a case arising under Section 244 concerning itself with an action of trespass or negligence or nuisance, and we claim that is not applicable to the situation before your Honor. There have been cases arising under Section 244 which concern themselves with actions for breach of contract which are analogous to the case at Bar, which is a case for negligence or nuisance. The Court has held that Section 244 of the Second Class Cities Law should not apply.

The Court: I will have to take this matter under advisement and proceed with the trial. I will deny your motion, with a reservation.

Mr. McAneny: I will take an exception. May we take an adjournment at this time so we can go on after recess?

The Court: Yes. How long will your case take, Mr. McAneny?

Mr. McAneny: Could we take a recess until two o'clock? I do not think my case will take very long.

Mr. Moore: We will conclude the case this afternoon then.

(Recess to 2:00 p. m.)

AFTERNOON SESSION.

2:00 P. M.

GUSTAV W. KLEIN, JR., called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. McAneny:

Q. Mr. Klein, are you an official of the City of Yonkers? A. I am.

Q. What position do you hold? A. Deputy Comptroller, Department of Finance, City of Yonkers, New York. 206

Q. How long have you held that position? A. Since January 1, 1934.

Q. What position did you hold prior to that time? A. I was Treasurer of the City of Yonkers.

Q. For how long were you City Treasurer? A. From January 1, 1932 to December 31, 1933.

Q. And the position of City Treasurer was abolished as of December 31, 1933, was it? A. That is right.

Q. You then were appointed Deputy Comptroller? A. That is right.

Q. Was City Treasurer an elective office of the City? A. Yes, sir. 207

Q. Will you tell me what your duties were as City Treasurer? A. As City Treasurer—the duties of the City Treasurer's office are to see that the moneys received from the collection of taxes, the moneys which pass through the City Treasurer's office, were deposited in the bank, and to see that the proper securities for those moneys deposited in the banks were placed with the City Treasurer, to see that the checks were signed either by the Treasurer or Deputy, with the counter-signatures of the Comptroller of the City of Yonkers.

The Court: I see in the answer that it is alleged that certain of the bonds were not included in the

bonds that were returned. Is there any question about those?

Mr. McAneny: We agreed upon a schedule. It is the same as we put in the other cases.

Q. I show you a list of securities, Mr. Klein, and ask you if those were the securities deposited with you by the First National Bank and Trust Company? A. Yes, sir; that is the same list.

Mr. McAneny: I offer that list in evidence.

209 Mr. Moore: I have no objection to it.

(Marked Defendant's Exhibit C.)

Mr. McAneny: I offer in evidence a certified copy of the resolution of the Board of Estimate and Apportionment of the City of Yonkers.

Mr. Moore: I object to it as incompetent, irrelevant and immaterial.

Mr. McAneny: It is the same as the one in the other case.

The Court: Objection overruled; exception to the plaintiff.

210 (Marked Defendant's Exhibit D.)

Mr. McAneny: I would like to have this read on the record.

(Mr. Garrity read Defendant's Exhibit D.)

Mr. Moore: I move to strike this out.

The Court: What did you say was the date of that resolution?

Mr. McAneny: The certificate is as of February 20, 1936. It is a resolution adopted by the Board of Estimate and Apportionment on July 10, 1929.

The Court: All right.

Mr. Moore: I move to strike out the answer—the resolution that was just read, on the ground that it is incompetent, irrelevant and immaterial. That is not the State Law, and it has no bearing upon this case, because the First National Bank and Trust Company is not named in that as of the depositories.

The Court: Is it conceded that the First National Bank and Trust Company is the merged bank of those four banks named in the resolution?

Mr. Moore: Yes, of the three banks.

The Court: Three banks. I will deny your motion then. 212

Mr. Moore: Exception.

Mr. McAneny: I would like to read into the record Sections 69 and 70 of the Second Class Cities Law of the State of New York.

Mr. Rosenwasser: Sections 69 and 70 read as follows:

(Omitted for brevity.)

The Court: What chapter is that?

Mr. Rosenwasser: Laws of 1909, Chapter 55 as Amended. There was a slight change made in 69, but I am reading the law that applies when these 213 transactions were had.

The Court: What chapter?

Mr. Rosenwasser: Chapter 55 of the Laws of 1909.

By Mr. McAneny:

Q. Did you return to the First National Bank and Trust Company or its representatives the securities that were covered by the list which you have just examined? A. I did. That is, I returned $534,000 worth of securities.

Q. $534,000 par value? A. Par value.

214 *Gustav W. Klein, Jr., for Defendant—Direct.*

Q. You still hold what? A. $1,000.

Q. $1,000 of that amount. Have you the receipts that you received when you made those returns? A. I have.

Mr. McAneny: I offer these receipts in evidence.

Mr. Moore: May I see them just a minute? Were those the same ones that were offered in evidence before (documents handed to Mr. Moore)? No objection.

(Marked Defendant's Exhibit E.)

215 Q. Do you know Mr. Trudeau? A. I do.

Q. Did you see him sign some of those receipts? A. I did.

Q. Do you know his signature? A. I do.

Q. Is that his signature on all of those receipts? A. It is.

Q. When you made the return of those securities, under what arrangement, or what was said between you and Mr. Trudeau at the time you made the return of any of those deposits?

Mr. Moore: I think we should know what arrange-

216 ment.

Q. (Continuing) Well, what was said? A. As I can remember the conversation I had with Mr. Trudeau with reference to the moneys we had deposited in the bank, he said to me that if he returned the moneys to the City that I should release the securities and that would be O.K. I said, "It is all right with us. As we get our money back, we will give you back securities," which we did.

Q. Mr. Klein, have you examined the checks, Defendant's Exhibits A and B for identification, this long list of checks that we examined this morning? A. I have looked over some of them, yes.

Gustav W. Klein, Jr., for Defendant—Cross. 217

Q. Could you state for what purpose those checks were issued by the City?

Mr. Moore: They attempted to prove that they were payroll checks. I object to it as incompetent, irrelevant and immaterial.

The Court: I do not know what the difference may be as to the payments for which those were made, in view of the fact that those were City funds. Is it material?

Mr. McAneny: I think it may be material if the question arises as covering the entire transactions 218
because I notice in certain cases the Courts have held that where it is a regular business transaction between the parties that they have some importance as to the effect. I would simply like to show that these checks were for the purpose of payrolls and matters upon which the City was necessarily obligated to pay.

The Court: He may answer.

Mr. Moore: I take an exception, your Honor.

A. They were payroll checks.

Mr. Moore: I move to strike the answer out as incompetent, irrelevant and immaterial. 219

The Court: I will let it stand.

Mr. Moore: Exception.

Q. Those were the checks which covered the debit items debited against the City in Plaintiff's Exhibits 7, 8 and 9; is that right? A. That is right.

Mr. McAneny: That is all. Your witness.

Cross examination by Mr. Moore:

Q. Where were those bonds that the City held that belonged to the bank kept? A. They were kept in safe deposit

220 *Gustav W. Klein, Jr., for Defendant—Cross.*

boxes, two or three safe deposit boxes of the bank in the Banking Building.

Q. Who had control over those boxes? A. Why, the treasurer and the officer of the bank. It was a dual control.

Q. At any time did you have them in your absolute control? A. No.

Q. You could not open the boxes without some representative of the bank being there? A. That is right.

Q. The bank could not open the box without you being there or some representative of yours? A. That is right.

231 Mr. McAneny: I object to this line of questioning in view of the fact that the complaint alleges that they were pledged with the City by the bank.

The Court: Objection overruled.

Mr. McAneny: Exception.

Q. You took care of the making of the deposits of the City money in the First National Bank and Trust Company? A. No, I did not take care of it.

Q. What were your duties? A. It was to see that the moneys were deposited.

Q. Who did take care of it? A. That was generally done
222 by the Deputy Comptroller and the Cashier.

Q. Who was Deputy Comptroller? A. The Deputy Comptroller at the time was Mr. Theodore Heinrich.

Q. Was he Deputy Treasurer or Comptroller? A. Deputy Treasurer.

Q. Who was the other man you mentioned? A. City cashier, James F. McLain.

Q. Have you the bank statements with you for the month of March, 1933 so far as it affects the First National Bank and Trust Company of Yonkers? A. I have not that here. Mr. Roake may have it.

Mr. Moore: Have you that, Mr. Roake?

Mr. Roake: Yes (handing to Counsel).

Q. I hand you some papers and ask you if you will please tell us what those papers are. A. They are bank statements from the First National Bank and Trust Company.

Q. From what date to what date? A. From March 1, 1933 to March 15, 1933—from March 1, 1933 to March 31, 1933, on this top one.

Mr. Romm: Look at the end sheet.

The Witness: It is all one.

Q. Yes. A. From March 1, 1933 to August 10, 1933. 224

Mr. Moore: I want to have this marked for identification.

(Marked Plaintiff's Exhibit No. 13 for identification.)

Q. Are those the records which you regularly received in the course of the monthly statement from the First National Bank and Trust Company? A. Yes, they are.

Mr. Moore: I offer them in evidence, your Honor.

Mr. McAneny: No objection.

(Plaintiff's Exhibit No. 13 for identification received in evidence.) 225

Q. I ask you to examine them and tell me if anywhere on that statement that has been rendered by the First National Bank and Trust Company to the City of Yonkers there appears any account of any deposit after March 3, 1933?

Mr. McAneny: You mean on those statements?

Q. (Continuing) Yes, on those statements is what I am asking you. A. No deposits are listed on these.

226 *Gustav W. Klein, Jr., for Defendant—Re-direct—Re-cross.*

Q. Does the record now show that the exhibit which has been introduced as Plaintiff's Exhibit No. 13 is a statement of the account from the First National Bank and Trust Company to the Treasurer of the City of Yonkers from March until August?

Mr. McAneny: Is that a question?

Mr. Moore: Yes, it is supposed to be.

The Court: He is asking if the record so shows.

Mr. McAneny: I think the record speaks for itself on that point.

227 The Court: I think that is a fact.

Mr. Moore: That is all with this witness.

Re-direct examination by Mr. McAneny:

Q. Mr. Klein, the deposits made in the Nepperhan Sewer Fund, can you tell me where those moneys came from? A. They came from the County of Westchester.

Q. In what connection? A. In connection with the purchase of a sewer that was already built in the City of Yonkers.

Q. The City of Yonkers sold the County of Westchester a city sewer? A. Yes.

228 Q. And received moneys for that sewer; is that correct? A. Yes, sir.

Mr. McAneny: That is all.

Re-cross examination by Mr. Moore:

Q. Did you say that these checks in these boxes which you have just been interrogated about by Mr. McAneny were payroll checks? A. Yes, they are payroll checks.

Q. There are a great many checks in there that are not payroll checks? A. Yes, there are.

Q. There are several hundred of them? A. They are in payment of obligations. We term them all payroll

checks. It is really an official check, is what it is known as in the Treasurer's office.

Q. Can you examine without too much trouble check marked D-3935? A. D-39385?

Q. What is that check? A. That check is payable to the order of the City of Yonkers, contributions.

Q. For how much money? A. $824.30.

Q. There are quite a large number of such checks? A. Yes.

Q. Are there checks in there payable to constables? A. Yes; they are known as garnishee checks.

230

Q. There are a large number of those? A. There are some. I could not tell how many.

Q. Checks payable to the sheriff? A. Yes.

Q. And a great many checks to the New York State Employees Retirement System? A. That is right.

Mr. Moore: That is all.

Re-direct examination by Mr. McAneny:

Q. All of those checks that you have just been interrogated about were charged to the payrolls of the employees, were they not? A. That is right.

231

Mr. Moore: I object to that as incompetent, irrelevant and immaterial and move to strike out the answer.

Mr. McAneny: You asked him, and he can explain.

Mr. Moore: You asked him first and I objected to it.

The Court: That appears, does it not, anyway?

Mr. Moore: Yes.

Mr. McAneny: Yes. That is all, Mr. Klein.

(Witness excused.)

Mr. McAneny: I wish to ask your Honor if your Honor will take judicial notice of the Second Class Cities Law, including Sections 244 and 64, which are the laws of the State of New York? Do you consent to that?

Mr. Moore: Yes, certainly.

The Court: Yes.

Mr. McAneny: Will you take judicial notice of any other laws of the State of New York that we might wish to refer to in this case?

Mr. Romm: We would object to that. If the laws are offered here we could then be able to object. The laws of New York consist of general laws and local laws. The Court will take judicial notice of the general laws that cover the whole state, but not local laws belonging to the City of Yonkers. If they have any laws of this kind that they want to produce, they can produce them at this trial. The Court does not have to take notice——

Mr. McAneny: The only local law I would want to refer to would be a complete copy of the local law covering the Police and Firemen's Pension Funds. Otherwise it is only the general laws I would want to refer to.

Mr. Romm: What year?

Mr. McAneny: Part of which was read in evidence by the plaintiff.

Mr. Romm: All right.

Mr. McAneny: Do you consent that I can present them? That is all I care for. Otherwise the Court will take judicial notice of the general laws of the State of New York.

Mr. Romm: Yes.

The Court: Very well.

Mr. McAneny: The defendant rests, your Honor. I repeat the motions that I made at the close of the plaintiff's case to dismiss the complaint upon the same grounds and in the same words as there set forth; and I further ask that the Court in this case make a finding in favor of the defendant.

The Court: Is that required?

Mr. McAneny: I think the practice requires that I request the Court to make a finding in addition to my motion to dismiss.

Mr. Moore: We rest also.

The Court: I will withhold any action on this motion at this time.

Mr. Moore: Will you permit a certain time within which to put in our briefs?

The Court: Very well.

Mr. Moore: And also written requests of finding?

The Court: Yes.

Mr. McAneny: I believe the practice does not so require when you try a case without a jury. The rules of practice state that the Court itself shall make either a general or special finding just as though it were the verdict of the Jury. I do not think it is required that there be any finding.

Mr. Moore: I cannot see any harm done in submitting them to your Honor.

Mr. McAneny: That is not the practice, not in this case.

The Court: I see no reason why it should not be done. Of course, our rules provide in certain cases——

Mr. McAneny: I have no objection.

The Court: I think it is all right. I had a case the other day where they put in 250 requests.

Mr. McAneny: I have no objection at all except I think that is not the practice.

The Court: It involves questions that can be presented very briefly. Whatever time counsel agree on is all right with me.

Mr. Garrity: Where shall we send them?

The Court: I will be here all this month of January.

Mr. Moore: We can have ours two weeks after we get the testimony; perhaps in less time. The stenographer has advised me that we can have the testimony next week. Can we state a time certain?

The Court: How much time do you want, Mr. McAneny?

Mr. McAneny: There are four cases here. I would like to very carefully brief each one of them. I would like 30 days to submit a brief. I assume that we will submit separate briefs without exchanging briefs and reply briefs.

Mr. Moore: Yes.

The Court: Suppose you submit them on February 7th? You can send them to me at Buffalo.

Mr. Garrity: What address, Judge?

The Court: Just the Federal Courthouse. You also send me a copy of the minutes. Is there anything further?

Mr. Moore: Nothing further.

The Court: You distinguish any questions in the several cases, Mr. McAneny, as questions of law.

Mr. McAneny: I think that since in the main case it was conceded that the main accounts were public moneys, I think that there are simply the other questions of law to be construed. I believe that the question of public moneys was put in issue in the other cases and they have just a separate account.

The Court: Well, we will leave it that way. That closes the trial.

(Testimony closed.)

Plaintiff's Exhibit 1.

TREASURY DEPARTMENT
Office of Comptroller of the Currency

TREASURY DEPARTMENT

No. 653

OFFICE OF THE COMPTROLLER OF THE CURRENCY

Washington, D. C., March 20, 1933

WHEREAS, From information on file in this bureau, I am satisfied that "The First National Bank and Trust Company of Yonkers," located in the City of Yonkers, County of Westchester, and State of New York, is unable to transact and carry on its ordinary banking business, or to exercise its usual banking functions without prejudicing the rights of depositors and other creditors, and

WHEREAS, I deem it necessary to take immediate steps in order to conserve the assets of said bank for the benefit of the depositors and other creditors thereof;

NOW, THEREFORE, I, F. G. Awalt, Acting Comptroller of the Currency in pursuance of the power and authority vested in me by law and under the provisions of Title II, known as the "Bank Conservation Act" of an Act of Congress entitled "An Act to provide relief in the existing national emergency in banking, and for other purposes," approved March 9, 1933, do hereby appoint P. W. Trudeau Conservator of "The First National Bank and Trust Company of Yonkers," with all the powers, duties and responsibilities given to or imposed upon such officer under the provisions of said Act of Congress authorizing the appointment and creating the duties of a Conservator.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twentieth day of March, A. D., 1933.

F. G. AWALT,
Acting Comptroller of the Currency.

(SEAL)

(Duly certified April 15, 1933.)

244

Plaintiff's Exhibit 2.

TREASURY DEPARTMENT

No. 653

OFFICE OF THE COMPTROLLER OF THE CURRENCY

Washington, D. C. July 24, 1933

WHEREAS, P. W. TRUDEAU, was duly appointed and commissioned Conservator of "The First National Bank and Trust Company of Yonkers", located in the City of Yonkers, County of Westchester and State of New York, on
245 the twentieth day of March, 1933, and whereas the said P. W. TRUDEAU has resigned to take effect at the close of business on July 24, 1933.

NOW, THEREFORE, I, J. F. T. O'Connor, Comptroller of the Currency, do hereby appoint LOUIS D. ROSSIRE Conservator of "The First National Bank and Trust Company of Yonkers", to take effect at the close of business on the twenty-fourth day of July, 1933, in place of the said P. W. TRUDEAU, with all the powers, duties and responsibilities given to or imposed upon a Conservator under the provisions of Title II, known as the "Bank Conservation Act" of an Act of Congress entitled "An Act to provide relief
246 in the existing national emergency in banking, and for other purposes", approved March 9, 1933.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twenty-fourth day of July, A. D. 1933.

J. F. T. O'CONNOR
Comptroller of the Currency.

(SEAL)

(Duly certified September 9, 1933.)

247

Plaintiff's Exhibit 3.

TREASURY DEPARTMENT

No. 653

OFFICE OF THE COMPTROLLER OF THE CURRENCY

Washington, D. C., January 23, 1934.

WHEREAS, From information on file in this bureau, I am satisfied that "The First National Bank & Trust Company of Yonkers," located in the City of Yonkers, County of Westchester, and State of New York is insolvent and unable to pay its just and legal debts: 248

NOW, THEREFORE, I, J. F. T. O'Connor, Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of Section 1 of an Act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks, and for other purposes," approved June 30, 1876, do hereby appoint Arthur E. Muth, Receiver of "The First National Bank & Trust Company of Yonkers," with all the powers, duties, and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver.

249

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twenty-third day of January, A. D. 1934.

J. F. T. O'CONNOR
Comptroller of the Currency.

(SEAL)

(Duly certified May 27, 1936.)

250

Plaintiff's Exhibit 4.

TREASURY DEPARTMENT

No. 653

OFFICE OF THE COMPTROLLER OF THE CURRENCY

Washington, D. C., November 15, 1937.

WHEREAS, Arthur E. Muth was duly appointed and commissioned Receiver of "The First National Bank & Trust Company of Yonkers," located in the City of Yonkers, County of Westchester and State of New York on the
251 twenty-third day of January, 1934, and whereas the said Arthur E. Muth has resigned to take effect at the close of business on November 15, 1937.

NOW, THEREFORE, I, William Prentiss, Jr., Acting Comptroller of the Currency, do hereby appoint Walter F. Downey Receiver of "The First National Bank & Trust Company of Yonkers" to take effect at the close of business on the fifteenth day of November, 1937, in place of the said Arthur E. Muth, with all the powers, duties, and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States
252 which authorize the appointment of a Receiver.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this fifteenth day of November, A. D., 1937.

WILLIAM PRENTISS, JR.
Acting Comptroller of the Currency.

(SEAL)

(Duly certified November 16, 1937.)

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Plaintiff's Exhibit 5.

PROCLAMATION

STATE OF NEW YORK

EXECUTIVE CHAMBER

Until early this morning it was my hope that it would not be necessary to interrupt the continuous operation of the banking system of New York State. The spread of hysteria and the restrictions imposed upon the banking facilities of the country through measures adopted in so many states have at last placed upon the New York banks a burden so great that it has finally rendered drastic action imperative here. 254

Therefore, at a meeting early this morning the Clearing House Committee of the New York Clearing House, with the advice and recommendation of the Federal Reserve Bank of New York, has asked me to proclaim a banking holiday lasting until the close of business, Monday, March 6th.

I make this proclamation with complete conviction that the best interests of the people of the State are being served thereby. This is a time for coolness and leadership. The people of this State and of the whole nation have shown a splendid spirit to date in meeting all the trying problems of the depression. I am confident that this spirit will be maintained. 255

The interval which this holiday affords should give responsible officials the necessary opportunity to consider the situation calmly and to prepare the way for an adjustment of our difficulties.

NOW, THEREFORE, I, Herbert H. Lehman, Governor of the State of New York, do hereby proclaim and set apart Satur-

256 *Plaintiff's Exhibit 5.*

day, March 4th, and Monday, March 6th, as holidays on which all banking institutions will be closed.

GIVEN under my hand and the Privy Seal of the State at my residence, 820 Park Avenue, in the City of New York, this fourth day of March in the year of our Lord One Thousand nine hundred and thirty-three.

(SEAL)

HERBERT H. LEHMAN

257 BY THE GOVERNOR:

JOSEPH J. CANAVAN
Secretary to the Governor

State of New York
Department of State
Filed Mar 4—1933
EDWARD J. FLYNN
Secretary of State

258

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Plaintiff's Exhibit 6.

PROCLAMATION

STATE OF NEW YORK

EXECUTIVE CHAMBER

WHEREAS, a proclamation has been issued by the President of the United States declaring a bank holiday to and including March ninth, one thousand nine hundred thirty-three:

260

NOW, THEREFORE, I, Herbert H. Lehman, Governor of the State of New York, do hereby declare that the bank holiday heretofore declared by me in the State of New York is extended to and including said March ninth, one thousand nine hundred thirty-three.

GIVEN under my hand at 820 Park Avenue in the City of New York and under the Privy Seal of the State at the Capitol in the City of Albany this sixth day of March in the year of our Lord one thousand nine hundred thirty-three.

(SEAL)

HERBERT H. LEHMAN

261

By the Governor:

JOSEPH J. CANAVAN
Secretary to the Governor

State of New York
Department of State
Filed Mar 11—1933
EDWARD J. FLYNN
Secretary of State

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
			Balance Brought Forward					
	Feb 28 '33	35.25	181.58	46.14				
	Feb 28 '33	197.88	167.73	262.17				
	Feb 28 '33	257.43	3.35	198.22				
	Feb 28 '33	20.51	2.86	20.51				
	Feb 28 '33	198.12	20.51	35.10				
	Feb 28 '33	37.80	23.26	142.39				
	Feb 28 '33	256.03	23.25	27.00				
	Feb 28 '33	25.00	27.57	5.00				
	Feb 28 '33	4.76	29.70	27.22				
	Feb 28 '33	32.17	42.07	20.00				
	Feb 28 '33	32.40	27.22	23.09				
	Feb 28 '33	34.65	27.00	25.00				
	Feb 28 '33	25.38	25.00	25.54				
	Feb 28 '33	25.00	24.75	2.50				
	Feb 28 '33	25.00	36.14	11.00				
	Feb 28 '33	36.14	36.14	32.50				
	Feb 28 '33	26.32	50,000.00	27.00				
	Feb 28 '33	20.00	27.00	27.00				
	Feb 28 '33	27.00	27.22	30.61				
	Feb 28 '33	25.00	27.22	25.00				
	Feb 28 '33	25.00	27.00	15.00				
	Feb 28 '33	32.40	10.00	27.22				
	Feb 28 '33	40.50	24.96	31.50				
	Feb 28 '33	20.00	20.00	41.53				
	Feb 28 '33	25.00	103.94	41.53				
	Feb 28 '33	27.00	27.22	24.75				
	Feb 28 '33	24.75	34.65	34.65				
	Feb 28 '33	15.00	25.00	27.22				
	Feb 28 '33	37.80	40.50	25.00				
	Feb 28 '33	39.60	25.00	24.75			Feb 28 '33	334,468.24
334,468.24	Feb 28 '33	90.33	87.67	82.04				
	Feb 28 '33	101.34	77.50	61.69				
	Feb 28 '33	93.74	32.64	33.08				
	Feb 28 '33	33.33	33.33	33.33				
	Feb 28 '33	33.33	33.33	39.02				
	Feb 28 '33	51.25	51.77	52.50				
	Feb 28 '33	90.00	67.16	64.25				
	Feb 28 '33	105.61	93.74	53.90				
	Feb 28 '33	113.21	51.67	106.95				
	Feb 28 '33	100.34	100.94	142.64				
	Feb 28 '33	258.25	340.79	170.99				
	Feb 28 '33	29.70	37.80	102.87				
	Feb 28 '33	61.69	78.50	105.94				
	Feb 28 '33	135.33	43.60	56.74				
	Feb 28 '33	51.85	51.46	68.91				
	Feb 28 '33	70.48	96.55	84.37				
	Feb 28 '33	84.37	47.59	51.85				
	Feb 28 '33	99.96	33.33	33.33				
	Feb 28 '33	61.60	22.00	23.79				
	Feb 28 '33	84.19	61.60	106.42				
	Feb 28 '33	135.93	106.57	100.47				
	Feb 28 '33	159.79	112.50	104.97				
	Feb 28 '33	78.58	104.41	51.35				
	Feb 28 '33	54.16	76.54	63.82				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY
Yonkers, N. Y.

Feb. 28, 1933 to
July 3, 1933

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Feb 28 '33	77.25—	50.00—	71.05—				
	Feb 28 '33	148.99—	117.59—	3.58—				
	Feb 28 '33	3.25—	3.60—	3.60—				
	Feb 28 '33	.91—	104.26—	94.94—				
	Feb 28 '33	106.65—	78.29—	88.54—				
	Feb 28 '33	51.55—	30.04—	57.12—				
	Feb 28 '33	65.62—	73.91—	82.55—				
	Feb 28 '33	70.52—	106.71—					
327,155.15	Feb 28 '33	50.50—	81.94—	68.34—			Feb 28 '33	327,155.15*
	Feb 28 '33	94.35—	140.62—	65.18—				
	Feb 28 '33	71.24—	89.18—	71.43—				
	Feb 28 '33	37.50—	107.11—	2.37—				
	Feb 28 '33	25.00—	77.97—	69.98—				
	Feb 28 '33	59.51—	82.60—	63.82—				
	Feb 28 '33	103.45—	115.02—	215.20—				
	Feb 28 '33	273.44—	69.23—	90.50—				
	Feb 28 '33	74.87—	84.32—	87.01—				
	Feb 28 '33	74.87—	88.66—	121.15—				
	Feb 28 '33	28.80—	222.85—	57.67—				
	Feb 28 '33	25.00—	27.00—	31.32—				
	Feb 28 '33	180.00—	114.37—					
323,811.78	Mar 1 '33	104.99—	82.49—	105.24—			Feb 28 '33	323,811.78*
	Mar 1 '33	47.25—	105.84—	27.22—				
	Mar 1 '33	82.49—	70.59—	105.14				
	Mar 1 '33	117.38—	106.65—	27.00—				
	Mar 1 '33	27.00—	107.06—	95.50—				
	Mar 1 '33	51.52—	62.75—	84.90—				
	Mar 1 '33	31.25—	115.90—	100.79—				
	Mar 1 '33	71.03—	5.00—	25.00—				
	Mar 1 '33	25.00—	11.00—	35.79—				
	Mar 1 '33	32.95—	7.13—	5.00—				
	Mar 1 '33	35.55—	25.00—	29.70—				
	Mar 1 '33	5.00—						
321,869.88	Mar 1 '33	128.13—	107.65—	73.58—			Mar 1 '33	321,869.88*—
	Mar 1 '33	101.55—	94.00—	153.41—				
	Mar 1 '33	78.74—	67.68—	101.25—				
	Mar 1 '33	83.09—	94.14—	79.77—				
	Mar 1 '33	95.53—	79.65—	71.42—				
	Mar 1 '33	83.50—	82.49—	251.63—				
	Mar 1 '33	57.47—	46.25—	84.03—				
	Mar 1 '33	82.70—	75.35—	83.58—				
	Mar 1 '33	170.40—	25.00—	97.97—				
	Mar 1 '33	94.66—	137.60—	49.33—				
	Mar 1 '33	20.00—	20.00—	99.76—				
	Mar 1 '33	211.61—	127.49—	112.50—				
	Mar 1 '33	57.49—	92.06—	68.53—				
	Mar 1 '33	68.18—	87.84—	78.45—				
	Mar 1 '33	125.32—	50.34—	57.44—				
	Mar 1 '33	103.94—	25.00—	27.00—				
	Mar 1 '33	156.09—	76.27—	43.33—				
	Mar 1 '33	56.12—	99.92—	55.31—				
	Mar 1 '33	78.75—	113.35—	63.85—				
	Mar 1 '33	66.78—	93.84—	84.09—				
	Mar 1 '33	88.53—	70.83—	63.16—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 1 '33	47.58—	63.28—	124.82—				
	Mar 1 '33	102.95—	122.47—	41.66—				
	Mar 1 '33	75.28—	20.00—	74.01—				
	Mar 1 '33	176.56—	82.49—	63.88—				
	Mar 1 '33	68.86—	57.78—	126.13—				
	Mar 1 '33	73.45—	92.59—	92.07—				
	Mar 1 '33	205.90—	70.55—	58.52—				
	Mar 1 '33	71.08—	78.45—	63.89—				
	Mar 1 '33	85.52—	112.50—	85.37—				
	Mar 1 '33	90.46—	50.00—	100.00—				
	Mar 1 '33	112.50—	177.50—	63.90—				
	Mar 1 '33	81.63—	51.11—	99.87—				
	Mar 1 '33	110.69—	65.26—	61.86—				
	Mar 1 '33	70.60—	51.67—	104.41—				
	Mar 1 '33	166.14—	57.14—	103.47—				
	Mar 1 '33	132.64—	310.12—	92.24—				
	Mar 1 '33	2.39—	79.80—	122.47—				
	Mar 1 '33	60.74—	56.25—	25.00—				
	Mar 1 '33	120.39—	120.29—	96.15—				
	Mar 1 '33	67.29—	73.93—	82.49—				
	Mar 1 '33	59.87—	19.86—	25.25—				
	Mar 1 '33	207.43—	83.97—	95.15—				
	Mar 1 '33	158.91—	4.81—	78.29—				
	Mar 1 '33	5.00—	110.35—	41.06—				
	Mar 1 '33	67.34—	66.85—	66.85—				
	Mar 1 '33	105.11—	116.64—	67.41—				
	Mar 1 '33	57.15—	36.66—	74.57—				
	Mar 1 '33	146.25—	50.83—	53.49—				
	Mar 1 '33	70.74—	106.84—	95.92—				
	Mar 1 '33	122.31—	8.00—	52.91—				
	Mar 1 '33	5.00—	19.51—	66.74—				
	Mar 1 '33	73.65—	103.54—	169.20—				
	Mar 1 '33	103.47—	101.25—	132.97—				
	Mar 1 '33	15.00—	94.48—	93.10—				
	Mar 1 '33	19.43—	151.84—	206.75—				
	Mar 1 '33	67.32—	105.24—	104.10—				
	Mar 1 '33	33.33—	105.52—	43.60—				
	Mar 1 '33	114.85—	63.78—	87.97—				
	Mar 1 '33	139.77—	159.51—	123.94—				
	Mar 1 '33	79.32—	80.53—	96.55—				
	Mar 1 '33	68.08—	63.59—	82.99—				
	Mar 1 '33	103.94—	98.21—	77.98—				
	Mar 1 '33	121.08—	163.18—	63.62—				
	Mar 1 '33	108.70—	96.85—	96.21—				
	Mar 1 '33	240.89—	88.69—	307.80—				
	Mar 1 '33	101.34—	93.74—	66.78—				
	Mar 1 '33	99.76—	99.32—	101.27—				
	Mar 1 '33	85.68—	99.53—	67.01—				
	Mar 1 '33	131.34—	115.76—	113.87—				
	Mar 1 '33	54.16—	78.38—	88.97—				
	Mar 1 '33	74.44—	69.56—	52.27—				
	Mar 1 '33	61.09—	56.69—	78.48—				
	Mar 1 '33	59.85—	49.50—	67.37—				
	Mar 1 '33	117.59—	59.64—	76.25—				
	Mar 1 '33	108.38—	84.67—	93.37—				
	Mar 1 '33	70.98—	56.79—					

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 1 '33	78.75—	82.93—	58.46—				
	Mar 1 '33	66.71—	141.87—	112.22—				
	Mar 1 '33	86.74—	301.95—	65.61—				
	Mar 1 '33	84.08—	29.76—	20.00—				
	Mar 1 '33	25.20—	105.11—	146.96—				
	Mar 1 '33	127.10—	.02—	117.43—				
	Mar 1 '33	2.50—					Mar 1 '33	299,912.96*—
299,912.96	Mar 1 '33	49.53—	106.24—	52.06—				
	Mar 1 '33	52.11—	66.71—	50.00—				
	Mar 1 '33	81.94—	101.85—					
	Mar 1 '33	56.67—					Mar 1 '33	299,295.85*—
299,295.85	Mar 1 '33	81.13—	50.88—	53.93—				
	Mar 1 '33	80.77—	88.87—	70.33—				
	Mar 1 '33	62.89—	57.44—					
	Mar 1 '33	52.15—	52.25—	88.20—				
	Mar 1 '33	99.24—	89.29—	25.00—				
	Mar 1 '33	25.00—	25.00—				Mar 1 '33	298,293.48*—
298,293.48	Mar 2 '33	27.22—	25.00—	5.00—				
	Mar 2 '33	25.00—	25.00—	135.00—				
	Mar 2 '33	36.22—	15.00—	10.00—				
	Mar 2 '33	71.30—	53.57—	29.70—				
	Mar 2 '33	103.61—	74.44—	100.23—				
	Mar 2 '33	6.90—	3.75—	168.75—				
	Mar 2 '33	10.00—	31.86—	222.98—				
	Mar 2 '33	78.55—	12.50—	60.03—				
	Mar 2 '33	82.50—	78.25—	53.13—				
	Mar 2 '33	90.74—	97.84—	39.16—				
	Mar 2 '33	21.00—	70.97—	82.49—				
	Mar 2 '33	107.04—	107.04—	105.00—				
	Mar 2 '33	66.67—	44.27—	90.36—				
	Mar 2 '33	85.47—	82.49—	74.40—				
	Mar 2 '33	96.65—	113.97—	96.36—				
	Mar 2 '33	91.05—	82.49—	56.25—				
	Mar 2 '33	124.06—	56.25—	56.25—				
	Mar 2 '33	61.95—	2.50—	92.35—				
	Mar 2 '33	71.38—	140.64—	27.22—				
	Mar 2 '33	87.42—	88.09—		Mar 2 '33		Mar 2 '33	294,178.12*—
294,178.12	Mar 2 '33	59.87—	49.13—	52.06—				
	Mar 2 '33	328.13—	51.17—	67.27—				
	Mar 2 '33	155.17—					Mar 2 '33	293,415.32*—
293,415.32	Mar 2 '33	17.84—	31.66—	23.06—				
							Mar 2 '33	293,342.76*—
293,342.76	Mar 3 '33	63.41—	2.50—	51.71—				
	Mar 3 '33	25.00—	31.66—	10.00—				
	Mar 3 '33	51.96—	20.00—	27.00—				
	Mar 3 '33	61.82—	70.37—	96.79—				
	Mar 3 '33	22.25—	55.76—	10.00—				
	Mar 3 '33	120.00—	103.68—	29.70—				
	Mar 3 '33	27.22—	25.00—	273.44—				
	Mar 3 '33	50.00—	31.66—	94.00—				
	Mar 3 '33	54.16—	31.66—	44.75—				
	Mar 3 '33	67.39—	104.35—	182.08—				
	Mar 3 '33	25.00—	72.07—	219.43—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 3 '33	43.75	14.17	22.50				
	Mar 3 '33	242.07	18.75	222.98				
	Mar 3 '33	49.33	257.25	150.93				
	Mar 3 '33	91.05	122.81	94.17				
	Mar 3 '33	84.00	41.26	50.00				
	Mar 3 '33	125.64	155.86	229.30				
	Mar 3 '33	168.30	12.50	113.34				
	Mar 3 '33	10.42	91.77	74.58				
	Mar 3 '33	12.50	325.50	844.78				
	Mar 3 '33	21.00	21.00	3.50				
	Mar 3 '33	3.50	3.00	833.03				
	Mar 3 '33	52.75	63.75	35.00				
	Mar 3 '33	72.36	67.50	53.22				
	Mar 3 '33	25.00	35.64	29.70			Mar 3 '33	286,070.37
	Mar 3 '33	27.60	32.40	67.38				
286,070.37	Mar 3 '33	27.22	25.00	25.00				
	Mar 3 '33	25.00	25.00	25.99				
	Mar 3 '33	25.00	25.00	29.70				
	Mar 3 '33	29.70	29.70	29.70				
	Mar 3 '33	36.10	36.22	37.80				
	Mar 3 '33	24.75	38.30	29.70				
	Mar 3 '33	15.00	22.00	31.50				
	Mar 3 '33	28.87	22.50	43.20				
	Mar 3 '33	37.80	32.40	26.56				
	Mar 3 '33	34.29	22.00	35.01				
	Mar 3 '33	29.02	25.00	35.10				
	Mar 3 '33	28.80	27.00	11.00				
	Mar 3 '33	37.80	33.65	32.40				
	Mar 3 '33	36.15	29.70	33.55				
	Mar 3 '33	40.95	35.93	25.00				
	Mar 3 '33	35.86	16.50	26.00				
	Mar 3 '33	27.22	22.00	29.70				
	Mar 3 '33	33.49	27.00	27.22				
	Mar 3 '33	36.69	25.00	34.03				
	Mar 3 '33	29.70	25.00	27.22				
	Mar 3 '33	29.23	27.00	27.00				
	Mar 3 '33	27.00	15.00	27.00				
	Mar 3 '33	27.00	29.02	24.00				
	Mar 3 '33	27.00	27.00	25.00				
	Mar 3 '33	29.25	25.00	27.00				
	Mar 3 '33	27.00	40.95	25.38				
	Mar 3 '33	27.00	32.40	25.00				
	Mar 3 '33	22.25	33.07	27.00				
	Mar 3 '33	35.10	25.00	31.26				
	Mar 3 '33	25.00	27.22	29.25				
	Mar 3 '33	25.00	27.00	29.85	Mar 3 '33			
	Mar 3 '33	31.50	29.70	40.32				
	Mar 3 '33	25.00	25.00	36.91				
	Mar 3 '33	25.45	35.83	21.67				
	Mar 3 '33	25.20	21.88	24.75				
	Mar 3 '33	25.00	25.00	27.00				
	Mar 3 '33	32.40	43.87	37.80				
	Mar 3 '33	37.80	37.80	28.16				
	Mar 3 '33	18.00	32.40	50.50				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward ☞						
	Mar 3 '33	32.40—	37.66—	25.00—				
	Mar 3 '33	29.57—	29.18—	43.20—				
	Mar 3 '33	32.40—	40.50—	29.25—				
	Mar 3 '33	25.00—	29.02—	22.69—				
	Mar 3 '33	25.00—	29.25—	29.25—				
	Mar 3 '33	25.00—	24.75—	27.22—				
	Mar 3 '33	26.40—	35.10—	24.75—				
	Mar 3 '33	27.00—	25.00—	37.80—				
	Mar 3 '33	24.75—	30.20—	22.25—				
	Mar 3 '33	36.07—	25.00—	25.00—				
	Mar 3 '33	27.00—	23.00—	29.25—				
	Mar 3 '33	11.00—	29.25—	24.00—				
	Mar 3 '33	27.00—	35.98—	27.00—				
	Mar 3 '33	32.40—	27.00—	27.22—				
	Mar 3 '33	11.00—	19.25—	22.00—				
	Mar 3 '33	23.63—					Mar 3 '33	281,390.87*
281,390.87	Mar 3 '33	27.22—	27.22—	15.00—				
	Mar 3 '33	32.40—	27.00—	35.67—				
	Mar 3 '33	27.00—	25.00—	25.21—				
	Mar 3 '33	35.01—	15.00—	5.00—				
	Mar 3 '33	25.00—	23.36—	27.00—				
	Mar 3 '33	29.70—	29.70—	39.60—				
	Mar 3 '33	27.22—	25.00—	30.25—				
	Mar 3 '33	29.70—	29.70—	22.00—				
	Mar 3 '33	5.00—	25.00—	29.70—				
	Mar 3 '33	25.00—	29.70—	37.80—				
	Mar 3 '33	25.00—	33.47—				Mar 3 '33	280,545.24*
280,545.24	Mar 4 '33	22.00—	30.89—	27.22—				
	Mar 4 '33	27.22—	29.70—	27.22—				
	Mar 4 '33	29.70—	27.22—	25.00—				
	Mar 4 '33	29.70—	29.70—	29.70—				
	Mar 4 '33	29.70—	25.57—	24.00—				
	Mar 4 '33	22.00—	27.22—	29.70—				
	Mar 4 '33	4.77—	2.38—	27.22—				
	Mar 4 '33	27.22—	25.28—	29.70—				
	Mar 4 '33	27.22—	27.22—	29.70—				
	Mar 4 '33	28.01—	29.70—	29.70—				
	Mar 4 '33	27.99—	27.22—	27.22—				
	Mar 4 '33	25.00—	27.00—	67.50—				
	Mar 4 '33	67.50—	23.29—	23.06—				
	Mar 4 '33	30.67—	29.70—	21.00—				
	Mar 4 '33	27.22—	22.00—	24.02—				
	Mar 4 '33	20.00—	11.00—	16.50—				
	Mar 4 '33	15.33—	22.43—	23.06—				
	Mar 4 '33	27.00—	11.00—	29.70—				
	Mar 4 '33	27.22—	43.83—	25.00—				
	Mar 4 '33	22.00—	28.44—	24.75—				
	Mar 4 '33	30.83—	20.00—	25.00—				
	Mar 4 '33	29.70—	25.00—	25.00—				
	Mar 4 '33	16.50—	27.00—	5.00—				
	Mar 4 '33	25.00—	22.00—	29.70—				
	Mar 4 '33	27.22—	27.00—	18.00—				
	Mar 4 '33	34.65—	27.22—	29.70—				
	Mar 4 '33	29.70—	27.22—	15.00—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail		Balance Brought Forward	Date	Deposits	Date	New Balance
	Mar 4 '33	29.70—	24.75—	29.70—				
	Mar 4 '33	27.46—	27.22—	29.70—				
	Mar 4 '33	24.50—	29.70—	35.04—				
	Mar 4 '33	37.80—	29.70—	43.20—				
	Mar 4 '33	27.00—	23.23—	25.00—				
	Mar 4 '33	29.70—	28.31—	40.95—				
	Mar 4 '33	32.17—	29.70—	29.70—				
	Mar 4 '33	25.00—	23.00—	27.22—				
	Mar 4 '33	27.00—	25.00—	22.00—				
	Mar 4 '33	25.00—	20.00—	23.72—				
	Mar 4 '33	15.00—	37.80—	20.00—				
	Mar 4 '33	25.09—	27.22—	25.00—				
	Mar 4 '33	32.40—	56.52—	31.66—				
	Mar 4 '33	31.20—	140.00—	25.00—				
	Mar 4 '33	50.40—	25.00—	28.34—				
	Mar 4 '33	22.00—	35.07—	32.12—				
	Mar 4 '33	10.00—	25.00—	25.00—				
	Mar 4 '33	35.00—	32.40—	16.50—				
	Mar 4 '33	30.57—	22.25—	26.32—				
	Mar 4 '33	27.22—	27.22—	29.70—				
	Mar 4 '33	24.75—	27.22—	27.22—				
	Mar 4 '33	29.70—	32.17—	32.17—				
	Mar 4 '33	19.25—	27.22—	27.22—				
	Mar 4 '33	29.70—	16.94—	29.70—				
	Mar 4 '33	25.46—	29.70—	27.22—				
	Mar 4 '33	27.22—	25.00—	29.70—				
	Mar 4 '33	29.35—	29.70—	27.22—				
	Mar 4 '33	27.22—	39.81—	27.00—				
	Mar 4 '33	24.75—	31.50—	32.40—				
	Mar 4 '33	28.80—	27.22—				Mar 4 '33	275.807.96
275.807.96	Mar 3 '33	19.25—	29.70—	30.67—				
	Mar 3 '33	27.22—	32.40—	27.22—				
	Mar 3 '33	25.00—	32.34—	29.70—				
	Mar 3 '33	24.00—	24.75—	2.38—				
	Mar 3 '33	27.31—	16.50—	30.80—				
	Mar 3 '33	31.05—	32.40—	37.73—				
	Mar 3 '33	23.69—	27.22—	29.70—				
	Mar 3 '33	10.00—	27.00—	29.70—				
	Mar 3 '33	20.00—	25.00—	29.70—				
							Mar 3 '33	275.105.53
275.105.53	Mar 8 '33	8.00—	8.00—				Mar 8 '33	275.089.53
275.089.53	Mar 9 '33	30.04—	27.22—				Mar 9 '33	275.032.27
275.032.27	Mar 10 '33	25.65—	11.00—	39.61—				
	Mar 10 '33	40.95—	27.00—	15.00—				
	Mar 10 '33	23.63—	23.36—	23.00—				
	Mar 10 '33	25.00—	32.40—	19.25—				
	Mar 10 '33	25.00—	36.10—	36.45—				
	Mar 10 '33	27.00—	27.00—	25.00—				
	Mar 10 '33	27.00—	32.40—	32.40—				
	Mar 10 '33	32.40—	20.00—	25.00—				
	Mar 10 '33	25.00—	25.00—	34.29—				
	Mar 10 '33	27.22—	24.00—	27.22—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward [redacted]						
	Mar 10 '33	5.00—	45.53—	19.25—				
	Mar 10 '33	38.54—	25.00—	27.22—				
	Mar 10 '33	27.00—	35.10—	27.19—				
	Mar 10 '33	25.00—	27.00—	24.00—				
	Mar 10 '33	23.33—	25.00—	25.00—				
	Mar 10 '33	25.00—	27.23—	29.70—				
	Mar 10 '33	26.44—	25.00—	32.01—				
	Mar 10 '33	25.00—	34.94—	5.00—				
	Mar 10 '33	22.00—	24.75—	25.00—				
	Mar 10 '33	25.00—	25.00—	28.35—				
	Mar 10 '33	26.38—	32.12—	32.40—				
	Mar 10 '33	29.70—	25.99—	27.00—				
	Mar 10 '33	37.80—	21.88—	25.00—				
	Mar 10 '33	22.00—	22.00—	24.50—				
	Mar 10 '33	24.02—	15.00—	29.85—				
	Mar 10 '33	32.40—	23.01—	27.00—				
	Mar 10 '33	36.45—	15.00—	25.00—				
	Mar 10 '33	37.80—	25.00—	25.00—				
	Mar 10 '33	22.50—	24.19—	37.80—				
	Mar 10 '33	36.22—	35.10—	30.54—				
	Mar 10 '33	36.91—	27.00—	22.00—				
	Mar 10 '33	27.00—	25.00—	25.00—				
	Mar 10 '33	25.00—	20.00—	37.80—				
	Mar 10 '33	26.06—	25.00—	27.22—				
	Mar 10 '33	15.33—	25.00—	31.50—				
	Mar 10 '33	25.00—	25.00—	27.00—				
	Mar 10 '33	22.00—	11.00—	29.70—				
	Mar 10 '33	28.50—	27.00—	27.00—				
	Mar 10 '33	32.11—	16.50—	20.87—				
	Mar 10 '33	6.00—	29.70—	29.70—				
	Mar 10 '33	27.00—	27.00—	27.96—				
	Mar 10 '33	27.00—	27.00—	25.00—				
	Mar 10 '33	27.00—	25.00—	27.00—				
	Mar 10 '33	33.66—	25.45—	24.59—				
	Mar 10 '33	37.80—	37.80—	27.00—				
	Mar 10 '33	31.97—	32.40—	27.00—				
	Mar 10 '33	27.00—	43.20—	27.00—				
	Mar 10 '33	33.75—	27.22—	38.30—				
	Mar 10 '33	35.10—	29.70—	34.03—				
	Mar 10 '33	37.80—	27.00—	27.00—				
	Mar 10 '33	33.49—	22.00—	37.80—				
	Mar 10 '33	27.00—	27.00—	28.35—				
	Mar 10 '33	25.00—	25.00—	27.22—				
	Mar 10 '33	25.00—	29.70—	24.00—				
	Mar 10 '33	27.73—	25.00—	23.26—				
	Mar 10 '33	37.80—	25.00—	29.70—				
	Mar 10 '33	37.80—	27.27—	27.00—				
	Mar 10 '33	25.00—	30.72—	27.00—				
	Mar 10 '33	16.50—	27.00—	23.31—				
	Mar 10 '33	29.25—	29.25—	26.00—				
	Mar 10 '33	25.00—	35.01—	25.00—				
	Mar 10 '33	33.52—	20.00—	25.00—				
	Mar 10 '33	25.00—	25.00—	27.00—				
	Mar 10 '33	34.65—	20.54—	7.00—				
	Mar 10 '33	35.10—	35.79—	37.66—				
	Mar 10 '33	27.22—	27.00—	27.00—				
	Mar 10 '33	29.70—	29.70—	35.54—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 10 '33	37.66—	27.69—	31.26—				
	Mar 10 '33	25.00—	20.00—	31.50—				
	Mar 10 '33	37.80—	25.00—	23.87—				
	Mar 10 '33	2.50—	26.12—	7.50—				
	Mar 10 '33	24.00—	25.00—	27.00—				
	Mar 10 '33	27.00—	25.00—	34.65—				
	Mar 10 '33	4.00—	40.95—	20.00—				
	Mar 10 '33	23.80—	35.10—	27.00—				
	Mar 10 '33	2.50—					Mar 10 '33	268,926.35
268,926.35	Mar 10 '33	27.60—	29.25—	29.25—				
	Mar 10 '33	25.00—	37.80—	27.00—				
	Mar 10 '33	25.00—	37.80—	25.00—				
	Mar 10 '33	29.85—	25.00—	25.25—				
	Mar 10 '33	41.81—	32.40—	33.47—				
	Mar 10 '33	25.00—	27.00—	34.65—				
	Mar 10 '33	16.50—	16.50—	25.00—				
	Mar 10 '33	33.60—	31.81—	25.00—				
	Mar 10 '33	25.00—	10.00—	25.00—				
	Mar 10 '33	30.61—	27.00—	27.00—				
	Mar 10 '33	36.14—	25.00—	33.71—				
	Mar 10 '33	52.15—	32.40—	27.00—				
	Mar 10 '33	25.00—	27.00—	25.00—				
	Mar 10 '33	33.61—	32.40—	27.00—				
	Mar 10 '33	25.00—	24.15—	27.00—				
	Mar 10 '33	27.00—	50.40—	38.30—				
	Mar 10 '33	35.10—	27.00—	15.00—				
	Mar 10 '33	15.00—	23.13—	27.00—				
	Mar 10 '33	27.00—	27.22—	27.22—				
	Mar 10 '33	27.22—	31.93—	27.00—				
	Mar 10 '33	25.00—	20.00—	35.01—				
	Mar 10 '33	33.80—	23.20—	33.55—				
	Mar 10 '33	27.00—	25.00—	50.50—				
	Mar 10 '33	34.83—	27.22—	25.00—				
	Mar 10 '33	27.00—	32.40—	25.00—				
	Mar 10 '33	27.00—	35.10—	32.40—				
	Mar 10 '33	25.00—	21.67—	33.65—				
	Mar 10 '33	37.80—	22.00—	43.20—				
	Mar 10 '33	27.83—	23.23—	25.00—				
	Mar 10 '33	56.07—	27.00—	37.80—				
	Mar 10 '33	25.00—	36.07—	44.10—				
	Mar 10 '33	27.00—	40.95—	22.00—				
	Mar 10 '33	27.00—	29.25—	27.00—				
	Mar 10 '33	29.25—	27.00—	27.00—				
	Mar 10 '33	29.70—	34.65—	21.30—				
	Mar 10 '33	23.09—	22.25—	25.00—				
	Mar 10 '33	22.25—	25.00—	35.86—				
	Mar 10 '33	25.00—	25.03—	2.50—				
	Mar 10 '33	23.09—	34.65—	25.00—				
	Mar 10 '33	20.00—	35.10—	32.40—				
	Mar 10 '33	37.80—	27.00—	27.88—				
	Mar 10 '33	35.04—	25.00—	27.00—				
	Mar 10 '33	26.43—	27.00—	27.00—				
	Mar 10 '33	40.95—	29.25—	32.40—				
	Mar 10 '33	32.40—	27.00—	25.00—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 10 '33	29.25—	25.00—	27.00—				
	Mar 10 '33	25.00—	27.00—	33.37—				
	Mar 10 '33	25.00—	16.50—	25.00—				
	Mar 10 '33	23.06—	22.00—	16.50—				
	Mar 10 '33	27.00—	25.00—	25.00—				
	Mar 10 '33	27.00—	28.03—	33.06—				
	Mar 10 '33	25.85—	25.00—	29.70—				
	Mar 10 '33	27.00—	25.00—	27.00—				
	Mar 10 '33	27.00—	29.25—					
	Mar 10 '33	25.00—	25.00—	35.98—				
	Mar 10 '33	27.00—	50.40—	25.00—				
	Mar 10 '33	20.00—	31.50—	16.50—				
	Mar 10 '33	27.00—	26.28—	27.00—				
	Mar 10 '33	20.00—	27.00—	25.07—				
	Mar 10 '33	25.38—	25.00—	25.00—				
	Mar 10 '33	15.00—	24.96—	32.40—				
	Mar 10 '33	30.00—	31.86—	25.00—				
	Mar 10 '33	40.50—	27.00—	35.10—				
	Mar 10 '33	22.00—	35.10—	32.40—				
	Mar 10 '33	32.40—	43.20—	25.00—				
	Mar 10 '33	56.52—	24.00—	25.00—				
	Mar 10 '33	25.00—	27.00—	25.00—				
	Mar 10 '33	22.25—	27.00—	25.10—				
	Mar 10 '33	27.00—	27.00—	25.00—				
	Mar 10 '33	29.25—	25.00—	27.22—				
	Mar 10 '33	27.00—	25.00—	27.00—				
	Mar 10 '33	29.25—	26.56—	22.00—				
	Mar 10 '33	28.09—	25.00—	24.75—				
	Mar 10 '33	27.00—	11.00—	32.40—				
	Mar 10 '33	31.50—	29.70—	37.80—				
	Mar 10 '33	25.00—	27.00—	24.00—				
	Mar 10 '33	32.40—	32.40—	25.10—				
	Mar 10 '33	25.00—	28.16—	19.25—				
	Mar 10 '33	25.00—	25.00—	25.00—				
	Mar 10 '33	22.00—	27.00—	25.00—				
	Mar 10 '33	25.00—	25.00—	32.40—				
	Mar 10 '33	29.70—	25.00—	24.75—				
	Mar 10 '33	29.25—	29.65—	25.00—				
	Mar 10 '33	25.00—	29.25—	25.25—				
	Mar 10 '33	30.57—	25.00—	25.00—				
	Mar 10 '33	27.00—	37.80—	25.00—				
	Mar 10 '33	35.74—	25.00—					
	Mar 10 '33	25.00—	27.88—	25.00—				
	Mar 10 '33	22.43—	97.98—	23.06—				
	Mar 10 '33	27.00—	27.00—	27.00—				
	Mar 10 '33	27.00—	27.00—	27.00—				
	Mar 10 '33	25.00—	27.00—	25.00—				
	Mar 10 '33	25.00—	27.22—	23.06—				
	Mar 10 '33	22.63—	25.00—	29.25—				
	Mar 10 '33	25.56—	25.00—		Mar 10 '33		Mar 10 '33	260,987.49*—
260,987.49	11 '33	27.00—	27.00—	27.00—				
	11 '33	25.00—	25.00—	27.00—				
	11 '33	25.00—	32.40—	25.00—				
	11 '33	27.00—	22.00—	15.60—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	11 '33	22.00—	25.00—	25.00—				
	11 '33	25.00—	25.00—	37.80—				
	11 '33	25.00—	27.00—	25.00—				
	11 '33	27.00—	25.69—	25.00—				
	11 '33	25.03—	25.00—	27.00—				
	11 '33	24.00—	27.00—	23.29—				
	11 '33	38.59—	23.09—	25.51—				
	11 '33	23.06—	25.00—	25.21—				
	11 '33	25.00—	27.00—	27.00—				
	11 '33	25.00—	25.00—	25.00—				
	11 '33	27.00—	25.00—	25.00—				
	11 '33	25.00—	16.50—	11.00—				
	11 '33	11.00—	27.22—	25.00—				
	11 '33	22.25—	49.76—	49.76—				
	11 '33	25.00—	27.00—	25.00—				
	11 '33	24.75—	25.00—	32.40—				
	11 '33	25.00—	27.00—	23.16—				
	11 '33	27.00—	29.70—	25.00—				
	11 '33	27.00—	25.00—	29.70—				
	11 '33	29.70—	25.00—	112.53—				
	11 '33	15.00—	25.00—	26.00—				
	11 '33	25.00—	27.00—	35.10—				
	11 '33	25.57—	24.75—	25.00—				
	11 '33	24.57—	25.35—	27.00—				
	11 '33	25.00—	24.96—	24.75—				
	11 '33	25.00—	27.00—	25.00—				
	11 '33	26.90—	25.21—	23.09—				
	11 '33	25.00—	25.00—	25.00—				
	11 '33	27.00—	22.25—	27.00—				
	11 '33	25.00—	22.00—	43.83—				
	11 '33	25.00—	27.00—	25.00—				
	11 '33	24.00—	25.48—	25.00—				
	11 '33	16.50—	16.50—	27.00—	11 '33			
	11 '33	25.00—	25.00—	25.00—				
	11 '33	25.00—	25.00—	27.00—				
	11 '33	28.03—	25.00—	32.40—				
	11 '33	27.00—	19.99—	27.00—				
	11 '33	27.00—	25.48—	25.00—				
	11 '33	25.00—	27.00—	22.00—				
	11 '33	25.00—	28.09—	27.00—				
	11 '33	25.00—	31.50—	27.00—				
	11 '33	25.00—	20.00—	15.00—				
	Mar 11 '33	35.79—	28.01—	2.38—				
	Mar 11 '33	28.35—	40.50—	16.50—				
	Mar 11 '33	4.68—	5.00—	29.25—				
	Mar 11 '33	27.00—	27.00—	25.35—				
	Mar 11 '33	25.00—	35.67—	27.00—				
	Mar 11 '33	27.00—	27.00—	27.00—				
	Mar 11 '33	29.70—	27.00—	31.50—				
	Mar 11 '33	27.00—	25.00—	27.00—				
	Mar 11 '33	24.00—	25.00—	25.00—				
	Mar 11 '33	30.37—	25.00—	25.00—				
	Mar 11 '33	27.00—	25.00—	25.00—				
	Mar 11 '33	25.00—	27.00—	25.00—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
			Balance Brought Forward					
	Mar 11 '33	25.00—	22.27—	25.00—				
	Mar 11 '33	25.00—	25.00—	25.00—				
	Mar 11 '33	25.00—	10.00—	25.00—				
	Mar 11 '33	27.00—	12.00—	17.22—				
	Mar 11 '33	27.00—	29.70—	25.00—				
	Mar 11 '33	25.00—	25.00—	27.00—				
	Mar 11 '33	27.00—	24.09—	25.00—				
	Mar 11 '33	25.00—	27.00—	21.14—				
	Mar 11 '33	28.09—	27.00—	22.00—				
	Mar 11 '33	25.00—	25.00—	25.00—				
	Mar 11 '33	25.00—	25.00—	27.00—				
	Mar 11 '33	23.49—	28.35—	27.00—				
	Mar 11 '33	25.00—	27.00—	25.00—				
	Mar 11 '33	25.00—	25.00—	11.00—				
	Mar 11 '33	27.00—	25.62—	25.00—				
	Mar 11 '33	32.50—	36.46—	37.80—				
	Mar 11 '33	16.50—	22.00—	25.00—				
	Mar 11 '33	32.40—	27.00—	27.00—				
	Mar 11 '33	23.26—	32.73—	18.00—				
	Mar 11 '33	25.00—	25.00—	25.00—				
	Mar 11 '33	11.00—	11.00—	25.00—				
	Mar 11 '33	28.97—	32.34—	25.00—				
	Mar 11 '33	29.25—	27.00—	24.00—				
	Mar 11 '33	27.00—	22.25—	27.00—				
	Mar 11 '33	27.00—	12.00—	25.03—				
	Mar 11 '33	25.00—	27.00—	27.00—				
	Mar 11 '33	27.00—	25.00—	25.00—				
	Mar 11 '33	25.00—	50.00—	25.62—				
	Mar 11 '33	32.40—	23.25—	27.00—				
	Mar 11 '33	25.00—	27.00—	19.25—				
	Mar 11 '33	25.00—	25.00—	19.25—				
	Mar 11 '33	6.88—	27.00—	25.00—				
	Mar 11 '33	37.80—	23.78—	15.00—				
	Mar 11 '33	25.00—	15.00—	27.00—				
	Mar 11 '33	27.00—	36.00—	27.00—				
	Mar 11 '33	16.50—	27.00—	27.00—				
	Mar 11 '33	26.00—	32.40—	27.35—				
	Mar 11 '33	30.72—	32.33—	25.00—				
	Mar 11 '33	27.22—	37.80—	25.00—				
	Mar 11 '33	25.00—	27.00—	25.00—				
	Mar 11 '33	27.00—	25.00—	38.07—				
	Mar 11 '33	25.00—	27.22—	29.70—				
	Mar 11 '33	25.00—	29.25—	25.45—				
	Mar 11 '33	29.70—	7.50—	28.35—				
	Mar 11 '33	29.60—	24.88—	28.00—				
	Mar 11 '33	27.00—	15.00—	25.00—				
	Mar 11 '33	27.25—	27.00—	25.00—				
	Mar 11 '33	25.00—	25.00—	25.00—				
	Mar 11 '33	49.76—	27.00—	46.60—				
	Mar 11 '33	35.10—	27.00—	10.00—				
	Mar 11 '33	27.00—	25.00—	35.10—				
	Mar 11 '33	5.00—	25.00—	25.00—				
	Mar 11 '33	29.70—	27.00—					
252,408.20	Mar 11 '33	27.00—	27.00—	25.00—			Mar 11 '33	252,408.20*—

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 11 '33	25.00—	27.00—	37.80—				
	Mar 11 '33	36.45—	4.70—	27.00—				
	Mar 11 '33	25.00—	35.95—	25.00—				
	Mar 11 '33	27.00—	28.01—	27.86—				
	Mar 11 '33	27.88—	27.00—	28.35—				
	Mar 11 '33	19.25—	20.00—	25.87—				
	Mar 11 '33	27.00—	27.00—	29.25—				
	Mar 11 '33	27.00—	25.00—	27.00—				
	Mar 11 '33	32.40—	22.00—	32.40—				
	Mar 11 '33	20.00—	20.00—	27.00—				
	Mar 11 '33	5.00—	7.13—	6.27—				
	Mar 11 '33	27.00—	27.00—	32.40—				
	Mar 11 '33	25.00—	27.00—	25.21—			Mar 11 '33	251,356.02
251,356.02	Mar 11 '33	29.61—			Mar 11 '33	29.60**	Mar 11 '33	251,356.01
251,356.01	Mar 13 '33	2.50—	27.00—	16.50—				
	Mar 13 '33	27.00—	25.00—	27.22—				
	Mar 13 '33	7.10—	27.00—	27.00—				
	Mar 13 '33	27.00—	27.00—	5.00—				
	Mar 13 '33	20.00—	27.00—	25.00—				
	Mar 13 '33	27.22—	27.22—	13.75—				
	Mar 13 '33	34.83—	50.50—	25.00—				
	Mar 13 '33	4.81—	2.40—	10.00—				
	Mar 13 '33	27.00—	32.40—	2.50—				
	Mar 13 '33	4.69—	5.00—	5.00—				
	Mar 13 '33	25.00—	32.17—	20.00—				
	Mar 13 '33	25.00—	27.00—	27.00—				
	Mar 13 '33	24.00—	27.00—	27.00—				
	Mar 13 '33	27.00—	7.50—	25.00—			Mar 13 '33	250,447.70
	Mar 13 '33	25.00—						
250,447.70	Mar 14 '33	25.00—	51.52—	29.70—				
	Mar 14 '33	29.70—	19.50—	27.00—				
	Mar 14 '33	20.00—	25.00—	27.00—				
	Mar 14 '33	25.00—	22.00—	5.00—				
	Mar 14 '33	4.79—	25.00—	25.00—				
	Mar 14 '33	30.00—	22.00—				Mar 14 '33	250,034.49
250,034.49	Mar 15 '33	120.39—	30.04—	65.18—				
	Mar 15 '33	87.84—	54.16—	78.55—				
	Mar 15 '33	83.58—	63.58—	242.15—				
	Mar 15 '33	75.28—	74.40—	99.24—				
	Mar 15 '33	74.87—	141.87—	156.09—				
	Mar 15 '33	41.66—	104.10—	106.65—				
	Mar 15 '33	135.33—	94.66—	117.59—				
	Mar 15 '33	103.47—	100.79—	75.00—				
	Mar 15 '33	53.22—	94.94—	94.00—				
	Mar 15 '33	104.41—	80.77—	90.33—				
	Mar 15 '33	158.91—	102.95—	60.08—				
	Mar 15 '33	61.80—	68.86—	93.74—				
	Mar 15 '33	43.33—	74.44—	83.09—				
	Mar 15 '33	78.58—	77.50—	104.41—				
	Mar 15 '33	307.80—	82.70—	81.94—				
	Mar 15 '33	60.74—	61.95—	58.46—				
	Mar 15 '33	57.47—	57.44—	63.59—				
	Mar 15 '33	57.49—	50.83—	87.67—				

** Pencilled line drawn through this deposit item on original exhibit.

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

d Balance	Date	Checks in Detail		Date	Deposits	Date	New Balante.
		Balance Brought Forward					
	Mar 15 '33	76.27—	101.25—				63.28—
	Mar 15 '33	94.14—	148.99—				63.85—
	Mar 15 '33	88.09—	67.50—				47.58—
	Mar 15 '33	71.05—	112.22—				78.75—
	Mar 15 '33	99.32—	94.35—				82.55—
	Mar 15 '33	57.78—	101.34—				79.77—
	Mar 15 '33	50.00—	49.53—				81.94—
	Mar 15 '33	2.00—	2.00—				92.06—
	Mar 15 '33	99.87—	81.63—				87.01—
	Mar 15 '33	107.11—	61.69—				121.15—
	Mar 15 '33	103.45—	94.48—				63.16—
	Mar 15 '33	70.37—	80.53—				65.62—
	Mar 15 '33	105.94—	94.00—				82.99—
	Mar 15 '33	89.29—	73.58—				68.18—
	Mar 15 '33	107.65—	73.91—				96.65—
	Mar 15 '33	2.40—	2.40—				84.03—
	Mar 15 '33	105.11—	95.92—				7.13—
	Mar 15 '33	67.68—	104.99—				70.74—
	Mar 15 '33	104.26—	101.25—				105.24—
	Mar 15 '33	84.32—	78.74—				102.87—
	Mar 15 '33	113.97—	115.02—				57.14—
	Mar 15 '33	56.25—	56.25—				58.52—
	Mar 15 '33	44.16—	78.50—				71.08—
	Mar 15 '33	79.65—	205.90—				101.34—
	Mar 15 '33	101.85—	78.21—				78.21—
	Mar 15 '33	96.21—	43.60—				63.82—
	Mar 15 '33	56.74—	51.46—				47.59—
	Mar 15 '33	51.55—	62.75—				77.25—
	Mar 15 '33	66.78—	105.11—				103.68—
	Mar 15 '33	10.00—	50.00—				71.24—
	Mar 15 '33	128.13—	22.98—				273.44—
	Mar 15 '33	115.90—	71.43—				159.79—
	Mar 15 '33	92.07—	78.45—				70.83—
	Mar 15 '33	70.60—	53.90—				96.55—
	Mar 15 '33	84.37—	117.43—				106.34—
	Mar 15 '33	106.95—	96.36—				115.76—
	Mar 15 '33	99.92—	62.89—				126.13—
	Mar 15 '33	71.03—	87.42—				112.50—
	Mar 15 '33	177.50—	70.52—				56.67—
	Mar 15 '33	163.18—	66.71—				97.97—
	Mar 15 '33	69.98—	106.24—				99.96—
	Mar 15 '33	54.90—	66.85—				70.33—
	Mar 15 '33	88.87—	84.09—				110.35—
	Mar 15 '33	49.13—	12.50—				67.38—
	Mar 15 '33	67.27—	51.85—				66.90—
	Mar 15 '33	100.47—	61.60—				51.35—
	Mar 15 '33	93.74—	59.87—				62.50—
	Mar 15 '33	61.69—	56.25—				56.25—
	Mar 15 '33	51.77—	51.71—				52.50—
	Mar 15 '33	52.11—	52.15—				51.25—
	Mar 15 '33	39.02—	38.08—				33.33—
	Mar 15 '33	33.33—	33.33—				33.33—
	Mar 15 '33	33.33—	32.64—				33.33—
	Mar 15 '33	33.33—	31.32—				15.00—
	Mar 15 '33	112.50—	51.67—				113.21—

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 15 '33	53.13—	57.44—	71.42—				
	Mar 15 '33	51.67—	137.60—	51.11—				
	Mar 15 '33	110.69—	88.20—	176.56—				
	Mar 15 '33	240.89—	166.14—	74.57—				
	Mar 15 '33	91.05—	215.20—	51.85—				
	Mar 15 '33	57.12—	124.82—	140.64—				
	Mar 15 '33	78.45—	66.74—	124.06—				
	Mar 15 '33	33.33—	89.18—	113.87—				
	Mar 15 '33	77.97—	71.38—	68.53—				
	Mar 15 '33	70.98—	57.15—	75.35—				
	Mar 15 '33	74.87—	121.08—	25.00—				
	Mar 15 '33	159.51—	25.00—	25.00—				
	Mar 15 '33	100.23—	82.49—	105.61—				
	Mar 15 '33	82.60—	83.97—	7.21—				
	Mar 15 '33	4.81—	98.21—	88.66—				
	Mar 15 '33	146.96—	127.12—	87.97—				
	Mar 15 '33	132.97—	251.63—	32.40—				
	Mar 15 '33	114.37—	116.86—	116.86—				
	Mar 15 '33	27.22—	50.50—	203.70—				
	Mar 15 '33	95.53—	22.00—	206.75—				
	Mar 15 '33	70.97—	86.12—	106.71—				
	Mar 15 '33	170.40—	79.32—	54.16—				
	Mar 15 '33	93.10—	83.50—	69.23—				
	Mar 15 '33	82.04—	70.59—	78.25—				
	Mar 15 '33	105.24—	96.55—	68.91—				
	Mar 15 '33	135.93—	103.47—	340.79—				
	Mar 15 '33	90.00—	57.67—	104.97—				
	Mar 15 '33	88.53—	74.01—					
	Mar 15 '33	192.69—					Mar 15 '33	224,269.83
224,269.83	Mar 15 '33	2.50—	105.84—	107.06—				
	Mar 15 '33	90.00—	53.57—	25.00—				
	Mar 15 '33	25.06—	105.14—	101.55—				
	Mar 15 '33	95.30—	68.34—	106.65—				
	Mar 15 '33	36.22—	53.93—	40.95—			Mar 15 '33	223,254.26
223,254.26	Mar 15 '33	22.98—			Mar 15 '33	22.98**	Mar 15 '33	223,054.26
223,054.26	Mar 16 '33	97.98—	180.00—	82.49—				
	Mar 16 '33	15.00—	68.08—	62.12—				
	Mar 16 '33	67.50—	63.41—	96.15—				
	Mar 16 '33	52.06—	120.29—	52.25—				
	Mar 16 '33	54.16—	73.93—	31.66—				
	Mar 16 '33	53.49—	67.34—	112.50—				
	Mar 16 '33	66.85—	146.25—					
	Mar 16 '33	41.66—	31.66—	103.61—				
	Mar 16 '33	88.54—	29.22—	27.00—				
	Mar 16 '33	28.35—	100.94—					
	Mar 16 '33	89.18—	25.00—	27.00—				
	Mar 16 '33	27.22—	25.00—	29.70—				
	Mar 16 '33	27.00—	22.27—	30.00—				
	Mar 16 '33	27.22—	26.53—	10.00—				
	Mar 16 '33	122.31—	29.70—	27.53—				
	Mar 16 '33	25.00—	39.15—	203.70—				
	Mar 16 '33	37.00—	21.00—	25.00—				
	Mar 16 '33	226.04—	25.51—	27.00—				
	Mar 16 '33	41.81—	29.70—	2.50—				

** Pencilled line drawn through this deposit item on original exhibit.

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

d Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 16 '33	29.25—	24.75—	27.00—				
	Mar 16 '33	27.00—	29.70—	2.75—				
	Mar 16 '33	2.75—	2.75—	25.00—				
	Mar 16 '33	25.00—	29.70—	22.40—				
	Mar 16 '33	25.00—	25.00—	25.00—				
	Mar 16 '33	25.00—	27.00—	27.22—				
	Mar 16 '33	33.07—	106.84—	27.00—				
	Mar 16 '33	23.06—	29.70—	25.00—				
	Mar 16 '33	4.20—	3.50—	3.50—				
	Mar 16 '33	3.95—	3.16—	3.58—				
	Mar 16 '33	3.03—	3.03—	2.75—				
	Mar 16 '33	37.80—	36.45—	37.80—				
	Mar 16 '33	27.00—	27.00—	27.00—				
	Mar 16 '33	27.00—	26.40—	26.40—				
	Mar 16 '33	27.00—	25.00—	19.25—				
	Mar 16 '33	25.16—	13.75—	20.00—				
	Mar 16 '33	27.00—	29.25—	25.00—				
	Mar 16 '33	27.00—	32.40—	27.22—				
	Mar 16 '33	23.16—	5.00—	53.24—				
	Mar 16 '33	92.74—	53.17—	67.39—				
	Mar 16 '33	67.29—	86.74—	65.61—				
	Mar 16 '33	66.71—	66.78—	82.49—				
	Mar 16 '33	92.59—	71.36—	59.51—				
	Mar 16 '33	25.00—	19.43—	67.32—				
	Mar 16 '33	36.66—	90.36—	27.00—				
	Mar 16 '33	63.82—	24.00—	337.88—				
	Mar 16 '33	5.00—	51.96—	50.88—				
	Mar 16 '33	39.49—	25.00—	41.53—				
	Mar 16 '33	22.00—	41.53—	103.94—				
	Mar 16 '33	53.62—	273.44—	123.94—				
	Mar 16 '33	72.36—	50.00—	4.68—				
	Mar 16 '33	24.06—	52.06—	25.00—				
	Mar 16 '33	27.22—	5.00—	85.52—			Mar 16 '33	215,717.70*—
15,717.70	Mar 16 '33	27.00—	31.66—	106.57—			Mar 16 '33	215,495.75*—
	Mar 16 '33	2.50—	27.22—	27.00—				
15,495.75	Mar 17 '33	16.50—	30.37—	30.37—				
	Mar 17 '33	29.70—	25.00—	94.71—				
	Mar 17 '33	35.10—	25.00—	27.00—				
	Mar 17 '33	20.46—	15.00—	105.36—				
	Mar 17 '33	105.36—	27.00—	30.54—				
	Mar 17 '33	27.00—	27.00—	27.00—				
	Mar 17 '33	27.00—	20.00—	25.00—				
	Mar 17 '33	5.00—	25.00—	25.99—				
	Mar 17 '33	25.00—	36.00—	50.40—				
	Mar 17 '33	29.95—	29.95—	53.24—				
	Mar 17 '33	75.00—	48.60—	5.00—				
	Mar 17 '33	84.19—	61.60—	27.00—				
	Mar 17 '33	22.00—	40.95—	20.00—				
	Mar 17 '33	166.20—	22.00—	20.00—				
	Mar 17 '33	25.00—	22.00—	5.10—				
	Mar 17 '33	23.01—	23.33—	28.52—				
	Mar 17 '33	27.00—	23.20—	32.40—				
	Mar 17 '33	27.00—	27.00—	36.22—				
	Mar 17 '33	76.25—	76.25—	24.75—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Bal
			Balance Brought Forward					
	Mar 17 '33	25.00—	35.87—	27.00—				
	Mar 17 '33	39.16—	106.42—	23.31—				
	Mar 17 '33	32.40—	25.00—	27.00—				
	Mar 17 '33	32.40—	15.00—	21.30—				
	Mar 17 '33	25.00—	24.75—	33.70—				
	Mar 17 '33	36.07—	37.80—					
	Mar 17 '33	27.22—	27.22—	27.00—				
	Mar 17 '33	25.00—	22.00—	27.00—				
	Mar 17 '33	30.37—	26.00—	25.00—				
	Mar 17 '33	140.62—	35.58—	35.10—				
	Mar 17 '33	35.10—	27.00—	29.70—				
	Mar 17 '33	43.60—	25.00—	37.80—				
	Mar 17 '33	36.45—	30.37—	2.50—				
	Mar 17 '33	34.65—	34.65—	32.40—				
	Mar 17 '33	32.40—	25.03—	27.00—				
	Mar 17 '33	31.20—	27.22—	33.75—				
	Mar 17 '33	27.00—	28.35—	34.28—				
	Mar 17 '33	34.28—	25.00—	36.14—				
	Mar 17 '33	36.14—	36.14—	32.08—				
	Mar 17 '33	27.00—	27.00—	23.33—				
	Mar 17 '33	27.73—	15.00—	27.00—				
	Mar 17 '33	25.00—	29.25—	27.00—				
	Mar 17 '33	27.00—	29.85—	37.80—				
	Mar 17 '33	39.05—	15.00—	25.00—				
	Mar 17 '33	25.21—	25.00—	27.00—				
	Mar 17 '33	33.55—	35.10—	37.80—				
	Mar 17 '33	24.19—	32.40—	24.00—				
	Mar 17 '33	33.47—	25.00—	27.00—				
	Mar 17 '33	32.40—	2.41—	38.75—				
	Mar 17 '33	30.37—	30.37—	26.64—				
	Mar 17 '33	23.80—	15.00—	36.10—				
	Mar 17 '33	31.93—	27.00—	25.00—				
	Mar 17 '33	19.25—	27.27—	37.80—				
	Mar 17 '33	25.00—	29.25—	24.59—				
	Mar 17 '33	63.75—	27.00—	25.03—				
	Mar 17 '33	22.25—	27.00—	25.00—				
	Mar 17 '33	36.91—	21.88—	27.00—				
	Mar 17 '33	25.00—	27.00—	27.00—				
	Mar 17 '33	59.87—	103.94—	88.69—				
	Mar 17 '33	32.40—	35.48—	16.50—				
	Mar 17 '33	25.00—	81.13—	27.19—				
	Mar 17 '33	25.00—	27.00—	25.00—				
	Mar 17 '33	31.66—	85.47—	16.50—				
	Mar 17 '33	33.60—	36.14—	37.80—				
	Mar 17 '33	25.00—	25.00—	35.79—				
	Mar 17 '33	25.00—	27.00—	25.00—				
	Mar 17 '33	27.22—	25.03—	25.00—				
	Mar 17 '33	78.29—	16.50—	27.00—				
	Mar 17 '33	29.70—	29.70—	25.00—				
	Mar 17 '33	27.22—	35.10—	29.25—				
	Mar 17 '33	22.00—	23.89—	32.40—				
	Mar 17 '33	27.22—	29.70—	27.00—				
	Mar 17 '33	19.25—	29.02—	25.00—				
	Mar 17 '33	27.22—	27.00—	25.00—				
	Mar 17 '33	25.21—	27.00—	27.00—				
	Mar 17 '33	33.07—	28.16—	27.00—				

** Pencilled line drawn through [illegible]

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Date	Checks in Detail			Date	Deposits	Date	New Balance
	Balance Brought Forward						
Mar 17 '33	34.65	34.65	27.00				
Mar 17 '33	31.26	35.01	27.00				
Mar 17 '33	37.80	28.50	93.74				
Mar 17 '33	25.00	25.00	168.75				
Mar 17 '33	46.60	32.40	28.50				
Mar 17 '33	27.00	26.00	29.70				
Mar 17 '33	25.00	37.06	36.15				
Mar 17 '33	35.10	40.50	38.54				
Mar 17 '33	25.00	34.94	25.00				
Mar 17 '33	27.00	37.80	33.60				
Mar 17 '33	23.63	19.94	33.49				
Mar 17 '33	23.87	25.00	37.80				
Mar 17 '33	31.50	35.54	32.11				
Mar 17 '33	35.10	38.30	51.17				
Mar 17 '33	20.00	37.66	29.70				
Mar 17 '33	27.00	18.00	25.00				
Mar 17 '33	25.00	21.75	25.38				
Mar 17 '33	2.38	37.80	32.40				
Mar 17 '33	37.80	37.80	33.65				
Mar 17 '33	35.10	24.75	36.69				
Mar 17 '33	25.00	25.00	25.00				
Mar 17 '33	27.00	27.00	21.67				
Mar 17 '33	32.90	24.00	25.00				
Mar 17 '33	25.00	29.20	310.12				
Mar 17 '33	37.80	27.22	27.86				
Mar 17 '33	32.40	27.00	32.40				
Mar 17 '33	31.97	29.85	27.00				
Mar 17 '33	153.41	37.80	25.00				
Mar 17 '33	25.00	36.22	29.70				
Mar 17 '33	34.65	25.00	27.22				
Mar 17 '33	24.00	2.50	27.96				
Mar 17 '33	25.00	27.22	25.00				
Mar 17 '33	25.00	27.00	22.42				
Mar 17 '33	33.80	16.50	27.00				
Mar 17 '33	25.00	27.00	24.75				
Mar 17 '33	25.00	25.62	23.26				
Mar 17 '33	25.00	25.00	27.00				
Mar 17 '33	16.50	31.05	25.00				
Mar 17 '33	43.15	30.37	25.00				
Mar 17 '33	41.53	27.00	25.00				
Mar 17 '33	25.38	27.00	19.35				
Mar 17 '33	22.50	35.10	29.25				
Mar 17 '33	2.40	211.61	25.00				
Mar 17 '33	32.40	25.45	27.00				
Mar 17 '33	11.00	25.00	35.10				
Mar 17 '33	27.00	25.00	25.00				
Mar 17 '33	27.00	25.00	25.00				
Mar 17 '33	40.95	27.00	25.00				
Mar 17 '33	24.75	25.00	25.00				
Mar 17 '33	25.00	27.00	25.00				
Mar 17 '33	27.22	24.15	25.00				
Mar 17 '33	27.00	25.00	23.06				
Mar 17 '33	25.00	25.00	34.65				
Mar 17 '33	27.00	25.00	22.25				
Mar 17 '33	27.00	25.00	32.40				
Mar 17 '33	75.00	82.49	35.67				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail		Date	Deposits	Date	New B
		Balance Brought Forward					
	Mar 17 '33	25.00—	34.03—		25.00—		
	Mar 17 '33	32.40—	29.70—		36.45—		
	Mar 17 '33	25.00—	10.00—		40.95—		
	Mar 17 '33	25.00—	25.65—		25.00—		
	Mar 17 '33	27.00—	21.14—		25.00—		
	Mar 17 '33	29.70—	25.00—		5.00—		
	Mar 17 '33	5.00—	25.07—		25.00—		
	Mar 17 '33	33.61—	27.00—		135.00—		
	Mar 17 '33	25.00—	29.70—		32.40—		
	Mar 17 '33	32.40—	31.50—		25.00—		
	Mar 17 '33	25.00—	40.95—		24.00—		
	Mar 17 '33	27.00—	25.00—		34.96—		
	Mar 17 '33	27.00—	25.00—		43.20—		
	Mar 17 '33	25.00—	32.40—		20.00—		
	Mar 17 '33	27.00—	37.80—		22.25—		
	Mar 17 '33	27.00—	25.00—		25.00—		
	Mar 17 '33	25.85—	25.00—		28.03—		
	Mar 17 '33	23.26—	35.04—		27.00—		
	Mar 18 '33	37.80—	24.50—		27.00—		
	Mar 17 '33	23.23—	22.16—		27.00—		
	Mar 17 '33	24.00—	24.75—		27.88—		
	Mar 17 '33	25.00—	40.95—		44.10—		
	Mar 17 '33	22.00—	27.00—		20.00—		
	Mar 17 '33	33.06—	27.00—		27.00—		
	Mar 17 '33	25.00—	34.65—		27.00—		
	Mar 17 '33	27.00—	29.25—		27.00—		
	Mar 17 '33	32.40—	32.40—		37.80—		
	Mar 17 '33	29.25—	27.00—		32.40—		
	Mar 17 '33	27.43—	35.10—		35.10—		
	Mar 17 '33	32.12—	25.00—		25.00—		
	Mar 17 '33	40.95—	25.00—		35.98—		
	Mar 17 '33	27.00—	41.81—		32.40—		
	Mar 17 '33	33.37—	34.29—		35.10—		
	Mar 17 '33	32.40—	26.28—		16.50—		
	Mar 17 '33	27.00—	26.44—		20.00—		
	Mar 17 '33	25.00—	25.00—		25.00—		
	Mar 17 '33	27.00—	25.00—		38.75—		
	Mar 17 '33	27.83—	15.00—		20.00—		
	Mar 17 '33	43.20—	26.53—		23.06—		
	Mar 17 '33	20.00—	22.25—		22.00—		
	Mar 17 '33	27.00—	32.73—				
	Mar 17 '33	27.00—	25.00—		16.50—		
	Mar 17 '33	25.00—	27.00—		29.70—		
	Mar 17 '33	35.10—	29.70—		32.40—		
	Mar 17 '33	20.00—	49.76—		27.00—		
	Mar 17 '33	24.25—	34.83—		25.00—		
	Mar 17 '33	24.75—	25.00—		50.40—		
	Mar 17 '33	27.00—	32.01—		29.70—		
	Mar 17 '33	5.00—	11.00—		26.90—		
	Mar 17 '33	25.00—	170.99—		24.88—		
	Mar 17 '33	27.22—	25.00—		27.00—		
	Mar 17 '33	28.31—	25.00—		25.00—		
	Mar 17 '33	25.00—	25.00—		27.00—		
	Mar 17 '33	25.00—	29.70—		27.00—		

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

lance	Date	Checks in Detail			Date	Deposits	Date	New Balance
			Balance Brought Forward					
	Mar 17 '33	27.00—	25.00—	4.79—				
	Mar 17 '33	26.56—	27.00—	28.47—				
	Mar 17 '33	27.00—	32.40—	25.00—				
	Mar 17 '33	31.50—	33.64—	32.40—				
	Mar 17 '33	25.00—	25.00—	29.70—				
	Mar 17 '33	29.25—	27.00—	27.00—				
	Mar 17 '33	25.00—	25.00—	37.80—				
	Mar 17 '33	24.75—	24.75—	11.00—				
	Mar 17 '33	25.00—	25.00—	25.00—				
	Mar 17 '33	22.25—	25.48—	25.00—				
	Mar 17 '33	25.00—	27.00—	25.00—				
	Mar 17 '33	25.00—	27.00—	30.37—				
	Mar 17 '33	25.00—	25.00—	32.40—				
	Mar 17 '33	36.46—	38.75—	56.52—				
	Mar 17 '33	32.40—	25.00—	27.00—				
	Mar 17 '33	37.80—	22.00—	27.00—			Mar 17 '33	196,468.32*—
68.32	Mar 18 '33	25.00—	25.57—	25.00—				
	Mar 18 '33	27.00—	82.49—	35.95—				
	Mar 18 '33	25.00—	25.00—	27.00—				
	Mar 18 '33	27.00—	25.00—	22.00—				
	Mar 18 '33	11.00—	25.00—	16.50—				
	Mar 18 '33	80.05—	27.00—	25.00—				
	Mar 18 '33	25.00—	25.00—	27.00—				
	Mar 18 '33	27.00—	25.54—	22.25—				
	Mar 18 '33	25.00—	24.57—	27.00—				
	Mar 18 '33	25.00—	25.21—	24.96—				
	Mar 18 '33	25.00—	33.52—	27.88—				
	Mar 18 '33	25.00—	22.43—	16.50—				
	Mar 18 '33	36.14—	25.00—	25.00—				
	Mar 18 '33	23.06—	27.00—	32.40—				
	Mar 18 '33	27.00—	25.48—	25.00—				
	Mar 18 '33	27.00—	25.00—	25.56—				
	Mar 18 '33	25.28—	25.00—	25.00—				
	Mar 18 '33	23.29—	25.51—	33.66—				
	Mar 18 '33	25.62—	18.12—	11.00—				
	Mar 18 '33	27.22—	29.70—	27.22—				
	Mar 18 '33	25.57—	25.35—	27.00—				
	Mar 18 '33	25.00—	16.50—	25.00—				
	Mar 18 '33	27.00—	24.00—	29.25—				
	Mar 18 '33	25.45—	25.00—	32.40—				
	Mar 18 '33	31.50—	25.00—	29.25—				
	Mar 18 '33	25.00—	25.00—	27.00—				
	Mar 18 '33	25.00—	25.00—	27.00—				
	Mar 18 '33	28.03—	24.96—	25.00—				
	Mar 18 '33	25.00—	25.00—	25.00—				
	Mar 18 '33	25.00—	27.22—	25.00—				
	Mar 18 '33	24.00—	25.00—	27.00—				
	Mar 18 '33	23.06—	25.00—	29.25—				
	Mar 18 '33	67.50—	16.50—	23.09—				
	Mar 18 '33	28.97—	49.33—	25.00—				
	Mar 18 '33	25.00—	27.00—	27.00—				
	Mar 18 '33	25.00—	60.00—	2.00—				
	Mar 18 '33	27.00—	36.00—	27.00—				
	Mar 18 '33	8.00—	27.00—	27.00—				
	Mar 18 '33	67.41—	27.00—	27.00—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 18 '33	12.00—	10.00—	25.00—				
	Mar 18 '33	222.85—	50.00—	25.00—				
	Mar 18 '33	24.00—	27.00—	35.86—				
	Mar 18 '33	25.00—	29.25—	49.76—				
	Mar 18 '33	25.00—	50.00—	50.00—				
	Mar 18 '33	32.40—	19.99—	19.99—				
	Mar 18 '33	44.75—	27.00—	226.04—				
	Mar 18 '33	25.00—	23.36—	23.26—				
	Mar 18 '33	25.00—	27.00—	34.38—				
	Mar 18 '33	168.75—	168.75—	23.26—				
	Mar 18 '33	27.00—	32.40—	27.00—				
	Mar 18 '33	61.82—	10.00—	5.00—				
	Mar 18 '33	5.00—	2.50—	27.00—				
	Mar 18 '33	27.00—	101.27—	24.00—				
	Mar 18 '33	32.40—	25.00—	27.00—				
	Mar 18 '33	29.70—	25.00—	25.00—				
	Mar 18 '33	27.00—	25.00—	25.00—				
	Mar 18 '33	34.83—	27.00—	43.83—				
	Mar 18 '33	25.00—	25.00—	27.00—				
	Mar 18 '33	26.00—	25.00—	25.00—				
	Mar 18 '33	25.69—	24.09—	27.00—				
	Mar 18 '33	25.00—	25.00—	40.50—				
	Mar 18 '33	2.41—	31.50—	25.00—				
	Mar 18 '33	25.00—	27.00—	24.00—				
	Mar 18 '33	25.00—	27.00—	30.37—				
	Mar 18 '33	25.00—	25.00—	25.00—				
	Mar 18 '33	27.22—	25.00—	25.00—				
	Mar 18 '33	25.00—	25.00—	27.00—				
	Mar 18 '33	27.00—	27.00—	29.70—				
	Mar 18 '33	27.00—	52.15—	19.25—				
	Mar 18 '33	25.00—	27.00—	23.13—				
	Mar 18 '33	27.00—	34.28—	27.00—				
	Mar 18 '33	22.30—	70.48—	5.00—				
	Mar 18 '33	24.96—	24.96—	112.53—				
	Mar 18 '33	27.00—	27.00—	27.00—				
	Mar 18 '33	27.00—	25.00—	25.00—				
	Mar 18 '33	25.00—	15.00—	328.13—				
	Mar 18 '33	24.00—	27.00—	25.00—				
	Mar 18 '33	29.70—	2.50—	25.00—				
	Mar 18 '33	25.00—	37.80—	25.00—				
	Mar 18 '33	25.00—	7.50—	27.00—				
	Mar 18 '33	27.00—	20.00—	31.50—				
	Mar 18 '33	28.00—	25.00—	25.48—				
	Mar 18 '33	20.00—	50.50—	43.20—				
	Mar 18 '33	25.00—	10.00—	27.00—				
	Mar 18 '33	25.00—	27.00—	16.50—				
	Mar 18 '33	25.69—	27.00—	114.85—				
	Mar 18 '33	25.00—	25.00—	24.75—				
	Mar 18 '33	25.00—	50.00—	25.00—			Mar 18 '33	187.90
	Mar 18 '33	25.00—	25.00—	25.00—				
187,901.54	Mar 18 '33	27.00—	25.00—	27.00—				
	Mar 18 '33	32.40—	27.00—	25.00—				
	Mar 18	25.10—	25.00—	7.50—				
	Mar 18 '33	38.59—	27.00—	25.38—				
	Mar 18 '33	25.00—	10.00—	25.00—				

Plaintiff's Exhibit 7.

First National Bank and Trust Company

Yonkers, N. Y.

Name Treasurer City of Yonkers

Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 18 '33	25.21—	27.00—	29.25—				
	Mar 18 '33	23.36—	27.00—	25.00—				
	Mar 18 '33	4.76—	25.00—	27.00—				
	Mar 18 '33	27.00—	20.00—	32.40—				
	Mar 18 '33	27.88—	27.00—	22.25—				
	Mar 18 '33	27.00—	28.01—	31.86—				
	Mar 18 '33	25.00—	27.00—	24.00—				
	Mar 18 '33	24.88—	25.00—	32.40—				
	Mar 18 '33	25.00—	27.00—	27.00—				
	Mar 18 '33	27.00—	27.22—	25.00—				
	Mar 18 '33	24.00—	19.25—	27.00—				
	Mar 18 '33	24.00—	27.00—	27.00—				
	Mar 18 '33	25.00—	24.00—	27.00—				
	Mar 18 '33	27.00—					Mar 18 '33	186,508.02*—
508.02	Mar 18 '33	25.00—	39.00—	25.00—				
	Mar 18 '33	27.00—	4.69—	5.00—				
	Mar 18 '33	5.00—	32.40—	29.70—				
	Mar 18 '33	29.70—	27.00—	27.00—				
	Mar 18 '33	25.00—	25.00—	25.00—				
	Mar 18 '33	84.37—	192.69—				Mar 18 '33	185,879.47*—
879.47	Mar 20 '33	25.00—	27.22—	25.00—				
	Mar 20 '33	27.00—	52.15—	20.00—				
	Mar 20 '33	20.00—	2.75—	2.75—				
	Mar 20 '33	3.00—	3.00—	3.00—				
	Mar 20 '33	8.75—	8.75—	2.75—				
	Mar 20 '33	2.75—	2.75—	4.20—				
	Mar 20 '33	4.20—	4.90—	2.20—				
	Mar 20 '33	2.75—	.85—	2.71—				
	Mar 20 '33	3.90—	3.90—	3.90—				
	Mar 20 '33	2.75—	31.50—	27.18—				
	Mar 20 '33	27.22—	5.00—	25.20—				
	Mar 20 '33	25.03—	25.00—	32.40—				
	Mar 20 '33	25.00—	27.00—	29.25—				
	Mar 20 '33	25.00—	22.00—	29.70—				
	Mar 20 '33	24.75—	24.00—	27.22—				
	Mar 20 '33	27.37—	16.50—	22.00—				
	Mar 20 '33	5.50—	9.00—	23.33—				
	Mar 20 '33	35.10—	25.00—	25.00—				
	Mar 20 '33	26.14—	23.33—	38.59—				
	Mar 20 '33	35.54—	32.40—	32.40—				
	Mar 20 '33	22.00—	25.00—	24.00—				
	Mar 20 '33	31.50—	23.20—	12.75—				
	Mar 20 '33	29.70—	37.66—	26.06—				
	Mar 20 '33	29.70—	27.00—	46.60—				
	Mar 20 '33	34.94—	33.80—	25.00—				
	Mar 20 '33	25.78—	30.15—	27.00—				
	Mar 20 '33	29.70—	25.00—	27.22—				
	Mar 20 '33	20.00—	23.87—	20.00—				
	Mar 20 '33	25.00—	27.00—	37.80—				
	Mar 20 '33	27.00—	25.00—	36.46—				
	Mar 20 '33	30.54—	27.22—	27.22—				
	Mar 20 '33	27.22—	128.57—	29.70—				
	Mar 20 '33	15.00—	25.00—	28.00—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Bal
		Balance Brought Forward						
	Mar 20 '33	27.73—	24.96—	27.22—				
	Mar 20 '33	27.22—	27.22—	25.62—				
	Mar 20 '33	23.09—	27.22—	25.00—				
	Mar 20 '33	27.83—	25.00—	25.00—				
	Mar 20 '33	25.00—	32.40—	25.00—				
	Mar 20 '33	32.11—	27.16—	25.00—				
	Mar 20 '33	29.70—	27.88—	27.22—				
	Mar 20 '33	27.22—	24.75—	25.65—				
	Mar 20 '33	24.75—	27.00—	34.83—				
	Mar 20 '33	30.73—	29.70—	27.22—				
	Mar 20 '33	28.02—	27.46—	32.40—				
	Mar 20 '33	35.10—	31.86—	33.66—				
	Mar 20 '33	27.00—	29.70—	27.00—				
	Mar 20 '33	30.67—	24.75—	28.12—				
	Mar 20 '33	29.70—	16.50—	25.00—				
	Mar 20 '33	75.00—	337.88—	27.00—				
	Mar 20 '33	29.70—	31.50—	31.50—				
	Mar 20 '33	38.54—	29.70—	8.25—				
	Mar 20 '33	25.00—	27.00—	26.53—				
	Mar 20 '33	26.72—	27.22—	29.70—				
	Mar 20 '33	40.95—	5.00—	24.75—				
	Mar 20 '33	32.73—	27.22—	25.00—				
	Mar 20 '33	25.00—	25.00—	20.00—				
	Mar 20 '33	24.00—	40.95—	22.00—				
	Mar 20 '33	29.70—	32.57—	30.64—				
	Mar 20 '33	9.57—	22.25—	27.00—				
	Mar 20 '33	33.60—	28.12—	29.89—				
	Mar 20 '33	10.00—	29.70—	22.75—				
	Mar 20 '33	30.50—	29.70—	29.70—				
	Mar 20 '33	28.18—	27.22—	27.22—				
	Mar 20 '33	29.70—	29.70—	19.25—				
	Mar 20 '33	27.22—	22.00—	24.00—				
	Mar 20 '33	22.00—	19.25—	27.54—				
	Mar 20 '33	25.00—	23.26—	25.00—				
	Mar 20 '33	23.06—	25.60—	27.00—				
	Mar 20 '33	34.65—	29.70—	27.22—				
	Mar 20 '33	25.00—	25.00—	27.22—				
							Mar 22 '33	180,279.29
180,279.29	Mar 20 '33	25.00—	26.28—				Mar 20 '33	180,228.01
180,228.01	Mar 20 '33	27.00—	27.00—	23.09—				
	Mar 20 '33	23.06—	25.38—				Mar 20 '33	180,102.48
180,102.48	Mar 20 '33	27.00—	25.00—	27.00—				
	Mar 20 '33	27.00—	25.00—	25.00—				
	Mar 20 '33	27.00—	35.10—	27.20—				
	Mar 20 '33	35.10—	25.00—	25.00—				
	Mar 20 '33	36.00—	36.00—	20.00—				
	Mar 20 '33	82.49—	27.00—	23.30—				
	Mar 20 '33	27.22—	27.22—	29.70—				
	Mar 20 '33	22.25—	29.70—	15.00—				
	Mar 20 '33	29.70—	27.00—	27.22—				
	Mar 20 '33	29.70—	29.70—	33.75—				
	Mar 20 '33	27.00—	27.22—	29.70—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

lance	Date	Checks in Detail			Date	Deposits	Date	New Balance
			Balance Brought Forward					
	Mar 20 '33	26.64—	27.22—	27.22—				
	Mar 20 '33	27.22—	27.22—	4.50—				
	Mar 20 '33	7.17—	27.22—	31.05—				
	Mar 20 '33	27.00—	27.25—	22.00—				
	Mar 20 '33	25.00—	29.70—	49.76—				
	Mar 20 '33	25.48—	21.14—	27.22—				
	Mar 20 '33	29.70—	25.00—	25.00—				
	Mar 20 '33	27.00—	32.40—	25.00—				
	Mar 20 '33	27.22—	25.00—	27.22—				
	Mar 20 '33	27.00—	35.10—	23.26—				
	Mar 20 '33	27.43—	27.00—	23.49—				
	Mar 20 '33	32.40—	25.00—	27.00—				
	Mar 20 '33	29.25—	107.04—	37.80—				
	Mar 20 '33	25.00—	25.00—	25.00—				
	Mar 20 '33	15.00—	10.00—	10.00—				
	Mar 20 '33	25.00—	65.26—	5.00—				
	Mar 20 '33	27.00—	15.00—	24.00—				
	Mar 20 '33	26.60—	24.00—	27.00—				
	Mar 20 '33	2.50—	24.00—	29.70—				
	Mar 20 '33	27.22—	25.00—	84.08—				
	Mar 20 '33	82.49—	27.22—	25.00—			Mar 20 '33	177,333.73*—
33.73	Mar 20 '33	29.25—	27.00—	29.25—				
	Mar 20 '33	116.64—	2.50—	30.37—				
	Mar 20 '33	15.00—	62.84—	38.07—				
	Mar 20 '33	38.07—	20.00—				Mar 20 '33	176,924.74*—
24.74	Mar 23 '33	108.38—	112.50—	117.38—				
	Mar 23 '33	117.59—	122.47—	207.43—				
	Mar 23 '33	105.52—	131.34—	122.47—				
	Mar 23 '33	301.95—	142.64—	132.64—				
	Mar 23 '33	139.77—	100.00—	108.70—				
	Mar 23 '33	125.32—	128.57—	105.00—				
	Mar 23 '33	151.84—	92.19—	20.00—				
	Mar 23 '33	27.00—	27.00—	27.00—				
	Mar 23 '33	27.00—	27.00—	16.50—				
	Mar 23 '33	27.00—	27.00—	20.00—				
	Mar 23 '33	33.61—	27.22—	25.00—				
	Mar 23 '33	40.95—	2.50—	4.73—				
	Mar 23 '33	29.70—	35.87—	36.69—				
	Mar 23 '33	24.00—	16.50—	35.74—				
	Mar 23 '33	27.43—	25.00—	34.93—				
	Mar 23 '33	27.00—	25.00—	29.25—				
	Mar 23 '33	10.00—	24.96—	43.20—				
	Mar 23 '33	37.80—	25.00—	27.00—				
	Mar 23 '33	20.00—	27.00—	27.00—				
	Mar 23 '33	39.15—	36.22—	60.00—				
	Mar 23 '33	5.00—	20.00—	27.00—				
	Mar 23 '33	27.00—	27.00—	27.00—				
	Mar 23 '33	79.80—	78.29—	46.25—				
	Mar 23 '33	82.50—	85.37—	88.97—				
	Mar 23 '33	78.38—	52.27—					
	Mar 23 '33	74.44—	85.70—	96.85—				
	Mar 23 '33	77.98—	78.48—	95.15—				
	Mar 23 '33	76.54—	99.76—	67.37—				
	Mar 23 '33	82.93—	93.37—	97.84—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Ba
		Balance Brought Forward ☛						
	Mar 20 '33	22.00—	29.70—	27.00—				
	Mar 20 '33	25.00—	25.00—	45.65—				
	Mar 20 '33	23.29—	16.5[illegible]—	35.01—				
	Mar 20 '33	16.50—	25.00—	36.45—				
	Mar 20 '33	27.00—	22.00—	27.00—				
	Mar 20 '33	25.00—	25.00—	24.00—				
	Mar 20 '33	27.00—	25.00—	25.00—				
	Mar 20 '33	25.00—	27.00—	25.00—				
	Mar 20 '33	15.00—	25.00—	27.25—				
	Mar 20 '33	27.25—	25.00—	23.13—				
	Mar 20 '33	22.00—	27.00—	25.00—				
	Mar 20 '33	25.38—	33.60—	25.21—				
	Mar 20 '33	16.50—	27.00—	27.00—				
	Mar 20 '33	27.19—	27.00—	27.00—				
	Mar 20 '33	24.00—	27.00—	27.00—				
	Mar 20 '33	22.00—	22.00—	27.00—				
	Mar 20 '33	25.00—	25.00—	25.00—				
	Mar 20 '33	25.00—	27.00—	25.00—				
	Mar 20 '33	25.00—	33.61—	25.00—				
	Mar 20 '33	25.21—	25.00—	25.00—				
	Mar 20 '33	37.80—	25.00—	25.00—				
	Mar 20 '33	27.00—	15.00—	37.80—				
	Mar 20 '33	25.00—	25.00—	20.00—				
	Mar 20 '33	20.00—	28.35—	25.00—				
	Mar 20 '33	11.00—	11.00—	25.00—				
	Mar 20 '33	27.00—	35.10—	27.00—				
	Mar 20 '33	16.50—	22.00—	22.00—				
	Mar 20 '33	30.61—	25.00—	30.61—				
	Mar 20 '33	25.00—	36.69—	25.00—				
	Mar 20 '33	24.15—	25.00—	27.00—				
	Mar 20 '33	34.65—	25.48—	25.00—				
	Mar 20 '33	27.00—	25.00—	24.75—				
	Mar 20 '33	27.00—	25.00—	15.00—				
	Mar 20 '33	24.00—	27.00—	27.00—				
	Mar 20 '33	32.40—	32.40—	31.99—	Mar 20 '33	31.99**		
	Mar 20 '33	31.97—	43.20—	25.00—				
	Mar 20 '33	32.40—	32.40—	32.40—				
	Mar 20 '33	43.20—	24.00—	35.10—				
	Mar 20 '33	31.50—	25.00—	38.59—				
	Mar 20 '33	25.00—	25.57—	23.26—				
	Mar 20 '33	27.00—	15.00—	27.00—				
	Mar 20 '33	25.00—	25.54—	25.00—				
	Mar 20 '33	23.06—	27.00—	23.06—				
	Mar 20 '33	5.50—	34.65—	34.65—				
	Mar 20 '33	25.00—	25.00—	25.00—				
	Mar 20 '33	25.00—	27.00—	25.00—				
	Mar 20 '33	25.00—	25.00—	25.00—				
	Mar 20 '33	24.19—	27.00—	15.00—				
	Mar 20 '33	32.40—	27.00—	20.00—				
	Mar 20 '33	25.00—	22.00—	27.00—				
	Mar 20 '33	29.25—	32.40—	32.40—				
	Mar 20 '33	20.00—	27.00—	27.00—				
	Mar 20 '33	22.43—	27.00—	23.09—				
	Mar 20 '33	25.00—	22.00—					

** Pencilled line drawn through this deposit item on original exhibit.

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

lance	Date	Checks in Detail	Date	Deposits	Date	New Balance
		Balance Brought Forward				
	Mar 20 '33	30.27—		36.32—		36.32—
	Mar 20 '33	36.32—		27.00—		40.95—
	Mar 20 '33	6.09—		27.00—		25.00—
	Mar 20 '33	29.51—		25.00—		27.22—
	Mar 20 '33	27.00—		25.00—		25.00—
	Mar 20 '33	25.00—		28.00—		27.00—
	Mar 20 '33	25.00—		25.00—		18.00—
	Mar 20 '33	27.22—		27.00—		25.00—
	Mar 20 '33	25.00—		25.00—		25.00—
	Mar 20 '33	25.00—		25.00—		31.50—
	Mar 20 '33	24.75—		25.00—		27.00—
	Mar 20 '33	27.00—		29.25—		30.37—
	Mar 20 '33	25.00—		27.88—		27.00—
	Mar 20 '33	2.25—		25.00—		2.13—
	Mar 20 '33	27.00—		25.00—		25.00—
	Mar 20 '33	31.50—		25.00—		27.00—
	Mar 20 '33	27.00—		27.00—		23.06—
	Mar 20 '33	25.00—		24.75—		25.00—
	Mar 20 '33	25.00—		32.40—		25.00—
	Mar 20 '33	25.00—		25.00—		25.00—
	Mar 20 '33	25.00—		30.73—		27.00—
	Mar 20 '33	27.00—		25.00—		25.00—
	Mar 20 '33	25.00—		25.00—		23.20—
	Mar 20 '33	25.00—		25.00—		25.00—
	Mar 20 '33	27.00—		27.00—		40.95—
	Mar 24 '33	25.00—		25.00—		8.00—
	Mar 24 '33	6.00—		19.25—		23.78—
	Mar 24 '33	22.50—		24.25—		15.00—
	Mar 24 '33	37.80—		25.00—		16.50—
	Mar 24 '33	27.00—		25.00—		27.00—
	Mar 24 '33	24.75—		4.77—		10.49—
	Mar 24 '33	25.00—		25.00—		27.88—
	Mar 24 '33	27.00—		27.00—		27.00—
	Mar 24 '33	25.00—		25.69—		35.79—
	Mar 34 '33	27.00—		12.00—		27.00—
	Mar 24 '33	27.00—		39.60—		25.00—
	Mar 24 '33	25.00—		36.57—		25.00—
	Mar 24 '33	27.00—		27.83—		
24.75					Mar 24 '33	139,976.86*—
				25.00—		25.00—
	Mar 25 '33	28.09—		22.00—		19.25—
	Mar 25 '33	24.01—		22.50—		25.00—
	Mar 25 '33	25.00—		27.00—		37.80—
	Mar 25 '33	25.00—		27.00—		27.00—
	Mar 25 '33	28.09—		25.00—		27.00—
	Mar 25 '33	25.00—		27.00—		25.00—
	Mar 25 '33	29.70—		25.00—		25.00—
	Mar 25 '33	23.33—		27.27—		34.65—
	Mar 25 '33	32.40—		29.25—		43.83—
	Mar 25 '33	24.75—		27.00—		27.00—
	Mar 25 '33	25.00—		24.75—		26.56—
	Mar 25 '33	32.40—		29.25—		27.00—
	Mar 25 '33	25.00—		24.90—		29.70—
	Mar 25 '33	31.50—		27.00—		25.00—
	Mar 25 '33	22.25—		27.00—		25.00—

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 25 '33	27.22—	33.71—	41.53—				
	Mar 25 '33	38.44—	27.00—	36.45—				
	Mar 25 '33	20.00—	20.00—	15.00—				
	Mar 25 '33	25.00—	22.00—	10.00—				
	Mar 25 '33	31.86—	19.25—	48.09—				
	Mar 25 '33	11.00—	11.00—	19.25—				
	Mar 25 '33	11.00—	27.43—	25.00—				
	Mar 25 '33	23.13—	32.40—	27.00—				
	Mar 25 '33	27.00—	27.67—	25.00—				
	Mar 25 '33	29.70—	15.00—	25.00—				
	Mar 25 '33	25.00—	27.00—	20.00—				
	Mar 25 '33	37.80—	29.25—	32.40—				
	Mar 25 '33	50.40—	25.62—	25.00—				
	Mar 25 '33	35.04—	24.50—	37.80—				
	Mar 25 '33	32.40—	27.22—	25.00—				
	Mar 25 '33	27.00—	25.00—	25.00—				
	Mar 25 '33	25.00—	25.00—	25.00—				
	Mar 25 '33	25.00—	22.25—	25.00—				
	Mar 25 '33	32.12—	25.00—	37.66—				
	Mar 25 '33	27.00—	40.50—				Mar 25 '33	15,986.96
							Mar 25 '33	[illegible]
139,976.86	Mar 25 '33	15,986.96—					Mar 25 '33	123,989.90
123,989.90	Mar 25 '33	5.00—	55.76—	25.00—				
	Mar 25 '33	27.00—	25.00—	27.22—				
	Mar 25 '33	27.00—	29.25—	25.00—				
	Mar 25 '33	25.00—	27.85—	6.00—				
	Mar 25 '33	2.40—	25.00—	27.35—				
	Mar 25 '33	15.00—	2.25—	2.25—				
	Mar 25 '33	37.50—	49.76—	27.00—				
	Mar 25 '33	25.00—	29.20—	24.96—				
	Mar 25 '33	24.96—	40.95—	35.93—				
	Mar 25 '33	22.00—	35.93—	27.22—				
	Mar 25 '33	27.22—	25.00—	35.67—				
	Mar 25 '33	27.00—	27.00—	25.00—				
	Mar 25 '33	28.01—	28.35—	32.17—				
	Mar 25 '33	29.25—	34.65—	4.68—				
	Mar 25 '33	27.00—	49.76—	35.95—				
	Mar 25 '33	25.00—	25.00—	25.00—				
	Mar 25 '33	27.00—	24.75—	11.00—				
	Mar 25 '33	27.00—	5.00—	27.22—				
	Mar 25 '33	31.50—	25.00—	24.00—				
	Mar 25 '33	27.00—	27.00—	27.00—				
	Mar 25 '33	27.00—	5.00—	4.76—				
	Mar 25 '33	35.10—	27.22—	37.80—				
	Mar 25 '33	25.00—	25.00—	25.00—				
	Mar 25 '33	25.45—	25.00—	27.00—				
	Mar 25 '33	29.70—	73.65—	48.89—				
	Mar 25 '33	48.89—	12.00—	26.00—				
	Mar 25 '33	25.00—	25.00—				Mar 25 '33	121,855.92
121,855.92					Mar 25 '33	6.93**	Mar 25 '33	121,862.85

** Pencilled line drawn through this deposit item on original exhibit.

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Balance	Date	Checks in Detail		Date	Deposits	Date	New Balance
		Balance Brought Forward					
	Mar 25 '33	32.40—	25.57—				32.40—
	Mar 25 '33	32.40—	29.70—				27.00—
	Mar 25 '33	25.00—	34.03—				24.75—
	Mar 25 '33	37.80—	25.00—				25.00—
	Mar 25 '33	25.00—	29.70—				32.40—
	Mar 25 '33	25.00—	50.50—				25.00—
	Mar 25 '33	27.00—	27.00—				25.00—
	Mar 25 '33	22.42—	27.00—				27.00—
	Mar 25 '33	24.75—	27.00—				25.00—
	Mar 25 '33	27.00—	23.16—				26.43—
	Mar 25 '33	27.00—	29.25—				32.04—
	Mar 25 '33	27.00—	25.00—				27.00—
	Mar 25 '33	25.00—	25.00—				29.70—
	Mar 25 '33	16.50—	23.01—				26.14—
	Mar 25 '33	27.00—	35.10—				27.88—
	Mar 25 '33	35.01—	29.25—				23.31—
	Mar 25 '33	39.15—	36.22—				28.03—
	Mar 25 '33	25.00—	25.45—				34.28—
	Mar 25 '33	27.00—	27.00—				24.00—
	Mar 25 '33	25.00—	22.00—				25.00—
	Mar 25 '33	25.00—	20.00—				27.22—
	Mar 25 '33	8.00—	26.00—				11.00—
	Mar 25 '33	27.00—	35.54—				25.00—
	Mar 25 '33	27.00—	35.10—				25.00—
	Mar 25 '33	37.80—	37.80—				25.00—
	Mar 25 '33	25.00—	25.00—				25.00—
	Mar 25 '33	25.00—	27.00—				29.25—
	Mar 25 '33	29.85—	27.00—				25.00—
	Mar 25 '33	25.00—	32.17—				25.00—
	Mar 25 '33	23.06—	30.37—				25.00—
	Mar 25 '33	27.00—	25.00—				25.00—
	Mar 25 '33	25.00—	24.00—				27.00—
	Mar 25 '33	25.00—	27.00—				23.09—
	Mar 25 '33	25.85—	27.00—				25.00—
	Mar 25 '33	27.00—	25.00—				27.00—
	Mar 25 '33	27.00—	27.00—				24.75—
	Mar 25 '33	27.22—	27.00—				27.00—
	Mar 25 '33	36.10—	22.00—				37.80—
	Mar 25 '33	25.00—	28.03—				25.00—
	Mar 25 '33	25.00—	25.07—				25.00—
	Mar 25 '33	10.00—	10.00—				27.22—
	Mar 25 '33	25.00—	27.22—				27.22—
	Mar 25 '33	34.83—	25.00—				25.00—
	Mar 25 '33	32.40—	27.00—				23.63—
	Mar 25 '33	25.00—	27.00—				27.22—
	Mar 25 '33	25.00—	33.49—				31.98—
	Mar 25 '33	31.20—	35.10—				37.66—
	Mar 25 '33	27.00—	35.10—				27.00—
	Mar 25 '33	35.10—	46.60—				29.70—
	Mar 25 '33	25.00—	30.54—				27.00—
	Mar 25 '33	34.94—	27.00—				39.61—

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Bal
		Balance Brought Forward						
121,862.85	Mar 25 '33	34.65—			Mar 25 '33	45.65**	Mar 25 '33	121,87
121,873.75—	Mar 26 '31	24.75—					Mar 26 '31	121,82
121,834.35	Mar 25 '33	25.00—	25.00—	25.00—				
	Mar 27 '33	2.50—	2.50—	7.50—				
	Mar 27 '33	5.00—	27.00—	25.00—				
	Mar 27 '33	32.40—	28.09—	53.17—				
	Mar 27 '33	29.70—	32.50—	25.00—				
	Mar 27 '33	26.30—	25.00—	23.01—				
	Mar 27 '33	29.68—	25.00—	27.00—				
	Mar 27 '33	27.00—	25.00—	39.70—				
	Mar 27 '33	19.86—	22.76—	5.00—				
	Mar 27 '33	27.00—	25.00—	25.00—				
	Mar 27 '33	27.22—	25.00—	2.50—				
	Mar 27 '33	2.50—	29.25—	25.00—				
	Mar 27 '33	28.01—	28.01—	10.00—				
	Mar 27 '33	34.29—	27.00—	4.79—				
	Mar 27 '33	29.25—	32.40—	27.00—				
	Mar 27 '33	2.41—	21.00—	2.25—				
	Mar 27 '33	1,638.19—	823.43—	52.45—				
	Mar 27 '33	2.23—	5.00—	20.00—				
	Mar 27 '33	25.00—	20.00—	24.00—				
	Mar 27 '33	5.00—					Mar 27 '33	118,14
118,143.48	Mar 27 '31	29.70—			Mar 27 '31	39.70	Mar 27 '31	118,15
118,143.48							Mar 27 '31	118,13
118,143.48	Mar 28 '31	27.00—	25.00—	93.74—				
	Mar 28 '31	93.74—	25.10—	25.00—				
	Mar 28 '31	25.00—	25.00—	40.50—				
	Mar 28 '31	28.35—	27.00—	19.50—				
	Mar 28 '31	25.00—	27.22—	27.00—				
	Mar 28 '31	5.00—	32.40—	51.52—				
	Mar 28 '31	25.00—	25.00—	25.00—				
	Mar 28 '31	25.00—					Mar 28 '31	117,42
117,420.41	Mar 29 '33	5.00—	25.35—	2.25—				
	Mar 29 '33	5.00—	23.78—	4.76—				
	Mar 29 '33	50.00—	27.00—	25.00—				
	Mar 29 '33	24.75—	25.00—	25.00—				
	Mar 29 '33	30.00—	15.00—	25.00—				
	Mar 29 '33	2.37—					Mar 29 '33	117,16
117,105.15	Mar 30 '33	29.70—	25.00—	25.00—				
	Mar 31 '33	22.00—	27.50—	16.50—				
	Mar 30 '33	22.00—	4.77—	113.35—				
	Mar 30 '33	25.00—	112.50—	112.50—				
	Mar 30 '33	25.00—					Mar 30 '33	116,5
116,566.33	Mar 30 '33	25.00—					Mar 30 '33	116,5
116,541.33	Mar 31 '33	67.50—	20.00—	27.00—				
	Mar 31 '33	27.00—	25.00—	27.00—				
	Mar 31 '33	27.00—	25.21—	20.00—				

** Pencilled line drawn through this deposit item on original exhibit.

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

ance	Date	Checks in Detail			Date	Deposits	Date	New Balance
			Balance Brought Forward					
	Mar 31 '33	58.33—	8.30—	5.00—				
	Mar 31 '33	10.00—	32.40—	20.25—				
	Mar 31 '33	25.00—	27.00—	4.29—				
	Mar 31 '33	25.00—	25.00—	22.00—				
	Mar 31 '33	27.00—	27.00—					
							Mar 31 '33	115,959.05*—
9.05	Apr 1 '33	25.00—	25.00—	21.00—				
	Apr 1 '33	24.00—	29.25—	27.00—				
	Apr 1 '33	29.70—	2.75—	25.00—				
	Apr 1 '33	35.67—	25.00—	25.00—				
	Apr 1 '33	25.00—	34.83—	27.00—				
	Apr 1 '33	27.22—	24.19—	26.00—				
	Apr 1 '33	25.00—	27.22—	29.25—				
	Apr 1 '33	28.00—	32.40—	29.70—				
	Apr 1 '33	25.38—	32.40—	25.00—				
	Apr 1 '33	25.00—	21.00—	25.00—				
	Apr 1 '33	25.20—	19.25—	25.00—				
	Apr 1 '33	22.00—	31.50—	22.00—				
	Apr 1 '33	25.00—	25.00—	22.00—				
	Apr 1 '33	31.50—	25.00—					
			25.00—	37.80—				
	Apr 1 '33	25.00—	27.96—	27.00—				
	Apr 1 '33	29.65—	22.69—	24.00—				
	Apr 1 '33	22.69—	25.00—	30.73—				
	Apr 1 '33	22.69—	36.14—	22.00—				
	Apr 1 '33	23.47—	27.67—	29.70—				
	Apr 1 '33	38.07—	43.83—	33.61—				
	Apr 1 '33	37.80—	22.50—	25.00—				
	Apr 1 '33	27.00—	33.00—	37.80—				
	Apr 1 '33	30.10—	27.22—	34.94—				
	Apr 1 '33	27.00—	24.00—	52.15—				
	Apr 1 '33	27.00—	19.50—	32.40—				
	Apr 1 '33	41.53—	43.20—	29.70—				
	Apr 1 '33	27.00—	38.30—	39.81—				
	Apr 1 '33	38.54—	35.10—	36.15—				
	Apr 1 '33	37.66—	27.00—	25.00—				
	Apr 1 '33	27.00—	27.00—	29.70—				
	Apr 1 '33	25.00—	27.00—	46.60—				
	Apr 1 '33	25.00—	40.50—	27.00—				
	Apr 1 '33	35.10—	36.45—	32.40—				
	Apr 1 '33	25.00—	27.00—	50.40—				
	Apr 1 '33	35.10—	35.10—	35.10—				
	Apr 1 '33	35.10—	30.54—	27.00—				
	Apr 1 '33	29.25—	31.05—	25.00—				
	Apr 1 '33	24.25—	56.52—	27.00—				
	Apr 1 '33	27.00—	43.20—	50.00—				
	Apr 1 '33	25.48—	27.00—	26.06—				
	Apr 1 '33	35.10—	35.79—	15.00—				
	Apr 1 '33	35.10—	22.75—	22.78—				
	Apr 1 '33	25.00—	20.82—	25.00—				
	Apr 1 '33	25.00—	29.70—	24.00—				
	Apr 1 '33	24.00—	27.00—	32.08—				
	Apr 1 '33	24.00—	25.00—	27.22—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New
		Balance Brought Forward						
	Mar 25 '33	99.76—	92.35—	56.79—				
	Mar 23 '33	61.09—	59.85—	22.00—				
	Mar 23 '33	23.79—	59.64—	73.48—				
	Mar 23 '33	64.25—	69.56—	92.19—				
	Mar 23 '33	56.69—	90.74—	27.00—				
	Mar 23 '33	67.01—	90.50—	52.91—				
	Mar 23 '33	71.30—	9.53—	67.16—				
	Mar 23 '33	55.31—	84.67—	78.75—				
	Mar 23 '33	63.90—	63.89—	70.53—				
	Mar 23 '33	20.00—	24.00—	27.00—				
	Mar 23 '33	43.20—	93.84—	15.00—				
	Mar 23 '33	76.25—	48.09—	29.20—				
	Mar 23 '33	36.45—	56.07—	35.74—				
	Mar 25 '33	27.00—	96.79—	31.97—				
	Mar 25 '33	32.40—	43.20—	36.45—				
	Mar 23 '33	36.45—	34.93—	29.20—				
	Mar 23 '33	41.85—	32.40—	35.91—				
	Mar 23 '33	31.98—	36.22—	35.00—				
	Mar 23 '33	56.07—	35.74—	46.07—				
	Mar 23 '33	27.22—	27.22—	22.00—				
	Mar 23 '33	27.00—	7.10—	5.00—				
	Mar 23 '33	2.39—	5.80—	1,652.51—				
	Mar 23 '33	1,639.54—	1,661.25—					
	Mar 23 '33	1,888.35—	828.22—	824.30—				
	Mar 23 '33	832.38—	844.78—	325.50—				
	Mar 23 '33	113.34—	168.30—	229.30—				
	Mar 23 '33	155.80—	125.64—	104.35—				
	Mar 23 '33	182.08—	736.65—	219.43—				
	Mar 23 '33	242.07—	222.98—	257.25—				
	Mar 23 '33	266.28—	150.93—	122.54—				
	Mar 23 '33	736.65—	266.28—	52.45—				
	Mar 23 '33	52.75—	21.00—	52.45—				
	Mar 23 '33	21.00—	12.50—	74.58—				
	Mar 23 '33	91.77—	10.42—	50.00—				
	Mar 25 '33	41.26—	84.00—	72.07—				
	Mar 25 '33	25.00—	43.75—	22.50—				
	Mar 23 '33	18.75—	49.33—	94.57—				
	Mar 23 '33	91.05—	3.50—	3.50—				
	Mar 23 '33	24.75—	27.22—	50.00—				
	Mar 23 '33	22.00—	25.00—	25.00—				
	Mar 23 '33	15.00—	15.00—	25.00—				
	Mar 23 '33	50.34—	27.22—	63.78—				
	Mar 23 '33	8.00—	22.00—	22.00—				
	Mar 23 '33	25.00—	25.00—	25.00—				
	Mar 23 '33	19.51—	25.00—	25.57—				
	Mar 23 '33	31.45—	39.25—	27.00—				
	Mar 23 '33	32.40—	20.00—	2.50—				
	Mar 23 '33	24.00—	20.00—	25.00—				
	Mar 23 '33	32.40—	16.50—	16.50—				
	Mar 23 '33	27.00—	35.01—	25.00—				
	Mar 23 '33	24.00—	25.00—	27.00—				
	Mar 23 '33	27.00—	27.00—	27.00—				
	Mar 23 '33	25.00—	25.00—	27.00—				
	Mar 25 '33	23.16—	27.00—	25.00—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

lance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 25 '33	30.37—	16.50—	22.00—				
	Mar 23 '33	27.00—	32.17—	27.00—				
	Mar 23 '33	15.00—	25.00—	28.35—				
	Mar 23 '33	50.00—	20.00—	20.00—				
	Mar 23 '33	27.00—	35.10—	10.00—				
	Mar 23 '33	2.50—	56.25—	25.00—				
	Mar 23 '33	38.07—	82.49—	35.95—				
	Mar 23 '33	25.00—	25.00—	25.00—				
	Mar 23 '33	62.12—	2.50—	29.25—				
	Mar 23 '33	20.00—	5.00—	2.50—				
	Mar 23 '33	38.44—	39.81—	27.00—				
	Mar 23 '33	25.00—	25.00—	27.00—				
	Mar 23 '33	23.78—	27.53—	15.00—				
	Mar 23 '33	27.00—	27.00—	25.00—				
	Mar 23 '33	30.04—	4.74—				Mar 25 '33	150,024.21*—
24.21	Mar 24 '33	35.10—			Mar 20 '33	35.00**	Mar 25 '33	150,024.11*—
24.11	Mar 25 '33	24.00—	32.40—	16.50—				
	Mar 20 '33	26.06—	26.53—	27.00—				
	Mar 20 '33	27.00—	15.00—	27.00—				
	Mar 20 '33	27.22—	25.00—	35.87—				
	Mar 20 '33	27.00—	29.95—	29.95—				
	Mar 20 '33	31.04—	28.99—	25.00—				
	Mar 20 '33	25.00—	27.00—	28.35—				
	Mar 20 '33	24.00—	25.38—	27.00—				
	Mar 20 '33	36.57—	32.40—	35.10—				
	Mar 20 '33	43.20—	25.00—	27.00—				
	Mar 20 '33	10.00—	25.25—	29.25—				
	Mar 20 '33	50.00—	21.14—	25.00—				
	Mar 20 '33	13.00—	27.67—	29.25—				
	Mar 20 '33	27.73—	27.00—	25.00—				
	Mar 20 '33	25.00—	27.00—	22.00—				
	Mar 20 '33	27.00—	25.90—	28.35—				
	Mar 25 '33	30.37—	21.67—	33.65—				
	Mar 20 '33	25.00—	24.74—	22.00—				
	Mar 20 '33	25.00—	37.80—	25.00—				
	Mar 20 '33	32.40—	25.00—	27.00—				
	Mar 20 '33	27.00—	27.00—	25.00—				
	Mar 20 '33	16.50—	25.00—	27.00—				
	Mar 20 '33	27.00—	27.00—	15.00—				
	Mar 20 '33	16.50—	22.00—	16.50—				
	Mar 20 '33	27.00—	25.00—	22.00—				
	Mar 20 '33	27.00—	25.56—	23.23—				
	Mar 20 '33	25.00—	27.00—	25.00—				
	Mar 20 '33	29.25—	25.00—	25.62—				
	Mar 20 '33	25.00—	25.00—	30.08—				
	Mar 20 '33	41.81—	27.35—	35.10—				
	Mar 20 '33	28.35—	32.40—	25.00—				
	Mar 20 '33	28.35—	28.35—	27.00—				
	Mar 20 '33	25.00—	25.00—	25.00—				
	Mar 20 '33	33.06—	22.00—	25.00—				
	Mar 20 '33	25.00—	15.00—	19.99—				
	Mar 20 '33	31.26—	37.80—	27.00—				
	Mar 20 '33	25.00—	15.00—	25.00—				
	Mar 25 '33	25.00—	24.09—	27.00—				

*Pencilled line drawn through this deposit item on original exhibit.

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New
		Balance Brought Forward ☛						
	Mar 25 '33	32.40—	25.00—	36.91—				
	Mar 25 '33	26.28—	7.00—	27.00—	Mar 25 '33	.07		
	Mar 25 '33	22.37—	27.00—	33.00—				
	Mar 25 '33	25.00—	29.25—	27.00—				
	Mar 25 '33	25.00—	32.34—	20.00—				
	Mar 25 '33	24.00—	24.59—	94.71—				
	Mar 25 '33	25.51—	27.00—	27.00—				
	Mar 25 '33	25.00—	25.00—	27.00—				
	Mar 25 '33	27.00—	25.00—	25.00—				
	Mar 25 '33	23.06—	29.70—	18.69—				
	Mar 25 '33	25.03—	25.00—	27.22—				
	Mar 25 '33	27.96—	23.49—	27.00—				
	Mar 25 '33	25.00—	27.00—	29.70—				
	Mar 25 '33	25.00—	25.03—	33.47—				
	Mar 25 '33	25.00—	32.40—	27.00—				
	Mar 25 '33	37.80—	36.46—	56.07—				
	Mar 25 '33	35.74—	40.95—	29.25—				
	Mar 25 '33	22.00—	25.00—	32.40—				
	Mar 25 '33	20.00—	22.00—	10.00—				
	Mar 25 '33	25.00—	27.00—	36.57—				
	Mar 25 '33	56.52—	27.00—	43.20—				
	Mar 25 '33	25.00—	38.30—	32.40—				
	Mar 25 '33	38.54—	25.00—	50.40—				
	Mar 25 '33	27.00—	35.10—	32.40—				
	Mar 25 '33	34.93—	36.00—	30.00—				
	Mar 25 '33	32.40—	25.00—	35.93—				
	Mar 25 '33	24.88—	27.00—	20.25—				
	Mar 25 '33	20.25—	10.50—	15.90—				
	Mar 25 '33	34.83—	34.83—	25.00—				
	Mar 25 '33	32.40—	29.70—	29.70—				
	Mar 25 '33	36.22—	27.00—	27.00—				
	Mar 25 '33	25.00—	28.50—	25.00—				
	Mar 25 '33	31.13—	27.00—	25.00—				
	Mar 25 '33	22.25—	25.00—	25.00—				
	Mar 25 '33	32.40—	20.00—	27.00—				
	Mar 25 '33	27.00—	22.50—	26.00—				
	Mar 25 '33	29.70—	26.12—	27.00—				
	Mar 25 '33	27.00—	48.60—	29.25—				
	Mar 25 '33	23.06—	37.80—	36.45—				
	Mar 25 '33	27.86—	27.00—	33.66—				
	Mar 25 '33	25.00—	25.00—	25.00—				
	Mar 25 '33	24.00—	24.88—	27.22—				
	Mar 25 '33	27.00—	25.00—	19.80—				
	Mar 25 '33	27.00—	22.00—	36.14—				
	Mar 25 '33	27.00—	36.07—	25.00—				
	Mar 25 '33	25.00—	25.00—	27.00—				
	Mar 25 '33	24.25—	27.00—	27.00—				
	Mar 25 '33	29.61—	29.61—	25.00—				
	Mar 25 '33	38.50—	32.11—	27.00—				
	Mar 25 '33	21.00—	28.97—	23.26—				
	Mar 25 '33	29.25—	25.00—	27.00—				
	Mar 25 '33	32.73—	32.40—	35.98—				
	Mar 25 '33	24.75—	27.00—	37.80—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Mar 25 '33	25.00—	27.00—	25.00—				
	Mar 25 '33	27.00—	25.00—	25.00—				
	Mar 25 '33	25.00—	27.00—	27.00—				
	Mar 25 '33	27.00—	20.00—	29.70—				
	Mar 25 '33	25.00—	25.00—	22.69—				
	Mar 25 '33	24.00—	33.55—	35.86—				
	Mar 25 '33	25.48—	25.00—	27.00—				
	Mar 25 '33	25.35—	25.00—	25.00—				
	Mar 25 '33	25.00—	25.99—	36.14—				
	Mar 25 '33	27.00—	30.72—	29.25—				
	Mar 25 '33	25.00—	25.00—	27.00—				
	Mar 25 '33	32.40—	25.00—	25.00—				
	Mar 25 '33	35.00—	25.00—	25.00—				
	Mar 25 '33	25.00—	21.88—	22.25—				
	Mar 25 '33	25.00—	27.00—	35.10—				
	Mar 25 '33	27.00—	15.00—	27.00—				
	Mar 25 '33	25.00—	25.00—	25.00—				
	Mar 25 '33	27.00—	18.00—	25.00—				
	Mar 25 '33	37.80—	40.95—	26.90—				
	Mar 25 '33	27.00—	25.00—	25.00—				
	Mar 25 '33	25.00—	27.00—	24.96—				
	Mar 25 '33	44.10—	25.00—	25.00—				
	Mar 25 '33	25.00—	25.00—	29.70—				
	Mar 25 '33	25.00—	25.00—	37.80—				
	Mar 25 '33	27.00—	32.40—	32.40—				
	Mar 25 '33	27.00—	31.56—	27.00—				
	Mar 25 '33	25.00—	25.00—	15.00—				
	Mar 25 '33	27.00—	24.75—	27.00—				
	Mar 25 '33	27.00—	23.36—	24.75—				
	Mar 25 '33	27.00—	31.93—	25.00—				
	Mar 25 '33	32.40—	22.25—	23.33—				
	Mar 25 '33	25.00—	27.00—	27.00—				
	Mar 25 '33	32.34—	25.69—	27.00—				
	Mar 25 '33	22.00—	25.00—	25.60—				
	Mar 25 '33	25.00—	25.00—	23.26—				
	Mar 25 '33	25.00—	25.00—	25.00—				
	Mar 25 '33	30.58—	25.00—	5.50—				
	Mar 25 '33	27.00—	27.00—	27.00—				
	Mar 25 '33	27.00—	25.00—	23.87—				
	Mar 25 '33	25.03—	25.00—	27.67—				
	Mar 25 '33	25.00—	22.00—	24.00—				
	Mar 25 '33	25.00—	25.00—	27.00—				
	Mar 25 '33	27.00—	20.00—	27.00—				
	Mar 25 '33	28.35—	37.80—	25.00—				
	Mar 25 '33	37.80—	37.80—	27.00—				
	Mar 25 '33	27.00—	27.00—	27.00—				
	Mar 25 '33	25.00—	27.00—	27.53—				
	Mar 25 '33	25.00—	29.25—	40.95—				
	Mar 25 '33	27.00—	21.04—	2.13—				
	Mar 25 '33	24.75—	27.00—	27.00—				
	Mar 25 '33	52.15—	40.95—					
	Mar 25 '33	29.25—	25.00—	32.40—				
	Mar 25 '33	25.00—	28.16—	27.00—				
	Mar 25 '33	27.00—	25.00—	22.25—				
	Mar 25 '33	20.00—	25.00—	25.00—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New
		Balance Brought Forward						
	Apr 1 '33	24.00—	24.00—	19.25—				
	Apr 1 '33	11.00—	25.00—	25.00—				
	Apr 1 '33	24.75—	22.00—	24.00—				
	Apr 1 '33	16.50—	24.00—	20.00—				
	Apr 1 '33	19.25—	22.00—	22.00—				
	Apr 1 '33	22.57—	22.43—	25.00—				
	Apr 1 '33	15.33—	43.87—	36.14—				
	Apr 1 '33	24.00—	28.03—	24.00—				
	Apr 1 '33	29.98—	18.92—	19.25—				
	Apr 1 '33	22.00—	22.95—	22.00—				
	Apr 1 '33	22.00—	22.00—	24.00—				
	Apr 1 '33	21.60—	27.67—	27.67—				
	Apr 1 '33	25.00—	34.29—	27.22—				
	Apr 1 '33	24.00—	19.25—	22.37—				
	Apr 1 '33	21.00—	18.00—	24.00—				
	Apr 1 '33	22.00—	21.27—	24.00—				
	Apr 1 '33	22.00—	37.80—	25.00—				
	Apr 1 '33	25.00—	35.54—	19.25—				
	Apr 1 '33	24.75—	25.00—	27.00—				
	Apr 1 '33	25.00—	11.00—	16.50—				
	Apr 1 '33	27.00—	25.00—	28.35—				
	Apr 1 '33	24.75—	35.10—	24.75—				
	Apr 1 '33	19.25—	23.09—	24.75—				
	Apr 1 '33	16.50—	16.50—	20.00—				
	Apr 1 '33	28.35—	25.00—	27.88—				
	Apr 1 '33	24.75—	15.00—	25.00—				
	Apr 1 '33	10.00—	22.00—	23.38—				
	Apr 1 '33	22.00—	24.00—	32.40—				
	Apr 1 '33	26.65—	22.00—	24.00—				
	Apr 1 '33	20.63—	25.00—	24.00—				
	Apr 1 '33	22.40—	22.00—	22.00—				
	Apr 1 '33	22.37—	27.00—	25.00—				
	Apr 1 '33	22.77—	24.00—	24.00—				
	Apr 1 '33	27.96—	21.30—	23.38—				
	Apr 1 '33	27.00—	25.00—	25.00—				
	Apr 1 '33	24.75—	23.33—	24.75—				
	Apr 1 '33	24.75—	25.00—	25.00—				
	Apr 1 '33	15.00—	23.33—	33.49—				
	Apr 1 '33	24.75—	25.00—	25.00—				
	Apr 1 '33	23.38—	20.00—	21.88—				
	Apr 1 '33	19.25—	25.00—	20.00—				
	Apr 1 '33	27.00—	27.22—	24.00—				
	Apr 1 '33	32.40—	25.00—	25.00—				
	Apr 1 '33	35.01—	29.25—	27.00—				
	Apr 1 '33	27.00—	2.75—	22.00—				
	Apr 1 '33	26.—	22.00—	24.00—				
	Apr 1 '33	27.00—	25.00—	34.65—				
	Apr 1 '33	34.65—	25.00—	32.34—				
	Apr 1 '33	25.00—	10.00—	19.50—				
	Apr 1 '33	27.00—	25.00—	19.25—				
	Apr 1 '33	27.22—	33.47—	17.32—				
	Apr 1 '33	37.80—	32.40—	32.40—				
	Apr 1 '33	32.40—	32.40—	32.40—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Date	Checks in Detail			Date	Deposits	Date	New Balance
	Balance Brought Forward ☞						
Apr 1 '33	43.20—	25.00—	29.70—				
Apr 1 '33	22.00—	24.00—	22.00—				
Apr 1 '33	22.00—	25.21—	33.60—				
Apr 1 '33	27.00—	32.40—	22.00—				
Apr 1 '33	25.00—	25.00—	25.00—				
Apr 1 '33	25.00—	25.00—	27.00—				
Apr 1 '35	27.00—	22.25—	25.00—				
Apr 1 '33	15.00—	24.00—	25.00—				
Apr 1 '33	27.00—	20.00—	34.65—				
Apr 1 '33	19.25—	25.00—	22.00—				
Apr 1 '33	19.25—	27.00—	27.00—				
Apr 1 '33	25.00—	25.00—	24.00—				
Apr 1 '33	27.00—	23.06—	31.26—				
Apr 1 '33	22.00—	21.00—	27.00—				
Apr 1 '33	25.00—	25.00—	27.00—				
Apr 1 '33	24.00—	29.70—	27.00—				
Apr 1 '33	28.09—	25.00—	27.00—				
Apr 1 '33	25.00—	27.00—	27.00—				
Apr 1 '33	27.00—	25.00—	26.28—				
Apr 1 '33	29.85—	25.00—	27.00—				
Apr 1 '33	25.00—	25.00—	25.00—				
Apr 1 '33	25.00—	31.86—	30.00—				
Apr 1 '33	40.50—	19.25—	24.50—				
Apr 1 '33	25.00—	25.00—	16.50—				
Apr 1 '33	23.63—	25.00—	23.87—				
Apr 1 '33	27.00—	25.00—	27.00—				
Apr 1 '33	23.06—	25.00—	32.73—				
Apr 1 '33	22.46—	22.50—	20.00—				
Apr 1 '33	20.00—	32.40—	35.10—				
Apr 1 '33	25.51—	29.25—	22.00—				
Apr 1 '33	27.00—	27.00—	24.75—				
Apr 1 '33	22.00—	25.62—	32.40—				
Apr 1 '33	22.00—	22.00—	27.00—				
Apr 1 '33	25.00—	35.10—	34.65—				
Apr 1 '33	25.00—	25.00—	32.68—				
Apr 1 '33	25.00—	22.43—	27.00—				
Apr 1 '33	32.12—	40.95—					
Apr 1 '33	25.00—	22.00—	23.38—				
Apr 1 '33	27.67—	27.00 -	24.09—				
Apr 1 '33	25.00—	25.00—	23.20—				
Apr 1 '33	24.00—	2.50—	27.00—				
Apr 1 '33	27.00—	25.00—	27.00—				
Apr 1 '33	22.00—	23.70—				Apr 1 '33	212,184.13*—
						Apr 1 '33	96,225.08*—
Apr 1 '33	35.10—			Apr 1 '33	30.10**	Apr 1 '33	96,220.08*—
Apr 1 '33	25.00—					Apr 1 '33	96,195.08*—
Apr 1 '33	21.26—	25.00—	32.40—				
Apr 1 '33	22.00—	29.70—	2.50—				
Apr 1 '33	39.15—	32.86—	37.80—				

ded line drawn through this deposit item on original exhibit.

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New
		Balance Brought Forward						
	Apr 1 '33	11.00—	16.50—	25.00—				
	Apr 1 '33	27.00—	37.80—	36.91—				
	Apr 1 '33	22.00—	37.80—	25.00—				
	Apr 1 '33	37.80—	25.00—	27.00—				
	Apr 1 '33	37.80—	36.45—	33.55—				
	Apr 1 '33	25.00—	37.80—	34.93—				
	Apr 1 '33	36.45—	37.80—	29.98—				
	Apr 1 '33	19.25—	26.14—	24.75—				
	Apr 1 '33	25.00—	25.00—	27.22—				
	Apr 1 '33	32.40—	34.03—	27.00—				
	Apr 1 '33	25.00—	25.00—	27.00—				
	Apr 1 '33	25.99—	27.00—	35.87—				
	Apr 1 '33	20.00—	15.00—	32.40—				
	Apr 1 '33	27.00—	36.32—	22.00—				
	Apr 1 '33	22.00—	24.95—	25.00—				
	Apr 1 '33	25.00—	24.75—	27.00—				
	Apr 1 '33	39.49—	36.22—	24.00—				
	Apr 1 '33	32.40—	40.95—	27.00—				
	Apr 1 '33	13.50—	19.25—	50.40—				
	Apr 1 '33	24.00—	22.00—	16.50—				
	Apr 1 '33	19.25—	22.00—	32.40—				
	Apr 1 '33	56.07—	50.50—	35.93—				
	Apr 1 '33	35.86—	34.83—	35.74—				
	Apr 1 '33	37.66—	32.40—	40.95—				
	Apr 1 '33	8.00—	36.69—	31.56—				
	Apr 1 '33	32.11—	27.00—	27.22—				
	Apr 1 '33	22.00—	27.67—	25.00—				
	Apr 1 '33	22.00—	21.14—	24.00—				
	Apr 1 '33	32.40—	23.16—	27.88—				
	Apr 1 '33	24.75—	24.75—	32.40—				
	Apr 1 '33	25.00—	37.80—	32.40—				
	Apr 1 '33	26.32—	24.00—	25.00—				
	Apr 1 '33	40.95—	25.00—	23.61—				
	Apr 1 '33	11.00—	11.00—	22.00—				
	Apr 1 '33	37.80—	25.00—	30.61—				
	Apr 1 '33	32.40—	25.37—	22.68—				
	Apr 1 '33	23.17—	25.00—	8.25—				
	Apr 1 '33	27.67—	27.00—	24.75—				
	Apr 1 '33	29.25—	25.00—	25.00—				
	Apr 1 '33	27.00—	26.32—	22.00—				
	Apr 1 '33	25.09—	26.77—	25.00—				
	Apr 1 '33	25.09—	25.00—	24.00—				
	Apr 1 '33	25.00—	25.00—	18.00—				
	Apr 1 '33	23.13—	29.70—	37.80—				
	Apr 1 '33	37.80—	35.04—	33.66—				
	Apr 1 '33	32.40—	25.90—	21.40—				
	Apr 1 '33	23.67—	27.00—	25.00—				
	Apr 1 '33	24.75—	6.19—	24.75—				
	Apr 1 '33	38.59—	25.00—	22.50—				
	Apr 1 '33	25.00—	37.80—	22.00—				
	Apr 1 '33	22.00—	43.20—	25.00—				
	Apr 1 '33	24.00—	22.00—	25.00—				
	Apr 1 '33	20.79—	29.70—	29.70—				
	Apr 1 '33	25.00—	22.46—	22.45—	Apr 1 '33	22.46		

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

lance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Apr 1 '33	24.00—	27.00—	22.00—				
	Apr 1 '33	34.28—	16.50—	15.00—				
	Apr 1 '33	20.00—	25.00—	24.75—				
	Apr 1 '33	24.00—	25.00—	34.65—				
	Apr 1 '33	27.00—	31.50—	25.00—				
	Apr 1 '33	25.00—	24.00—	32.40—				
	Apr 1 '33	25.00—	21.00—	21.67—				
	Apr 1 '33	24.75—	22.76—	29.25—				
	Apr 1 '33	25.00—	25.00—	25.00—				
	Apr 1 '33	25.00—	28.35—	27.22—				
	Apr 1 '33	23.06—	32.34—	25.00—				
	Apr 1 '33	25.00—	21.00—	27.00—				
	Apr 1 '33	25.00—	27.67—	27.67—				
	Apr 1 '33	24.75—	25.00—	25.00—				
	Apr 1 '33	25.00—	25.00—	25.00—				
	Apr 1 '33	25.00—	22.00—	33.65—				
	Apr 1 '33	32.40—	35.10—	25.00—				
	Apr 1 '33	25.00—	25.00—	23.06—				
	Apr 1 '33	22.00—	27.00—	37.80—				
	Apr 1 '33	22.25—	25.00—	28.16—				
	Apr 1 '33	24.75—	22.00—	17.19—				
	Apr 1 '33	22.42—	24.75—	25.00—				
	Apr 1 '33	24.00—	22.00—	22.00—				
	Apr 1 '33	27.00—	28.34—	25.00—				
	Apr 1 '33	25.00—	25.00—	25.38—				
	Apr 1 '33	27.00—	27.60—	29.95—				
	Apr 1 '33	27.00—	27.00—	33.75—				
	Apr 1 '33	20.00—	25.00—	27.00—				
	Apr 1 '33	32.40—	16.50—	29.25—				
	Apr 1 '33	22.00—	25.00—	29.25—				
	Apr 1 '33	19.25—	32.40—	24.00—				
	Apr 1 '33	24.00—	14.28—	23.26—				
	Apr 1 '33	25.00—	23.09—	24.75—				
	Apr 1 '33	23.06—	22.00—	22.00—				
	Apr 1 '33	22.00—	25.00—	22.79—				
	Apr 1 '33	25.00—	24.00—	27.00—				
	Apr 1 '33	22.50—	22.25—	25.00—				
	Apr 1 '33	16.50—	20.00—	24.75—				
	Apr 1 '33	23.26—	23.46—	16.50—				
	Apr 1 '33	24.00—	16.50—	24.00—				
	Apr 1 '33	23.38—	24.75—	25.00—				
	Apr 1 '33	19.25—	25.00—	27.00—				
	Apr 1 '33	25.00—	27.00—	25.00—				
	Apr 1 '33	25.00—	24.00—	24.75—				
	Apr 1 '33	27.00—	23.69—	25.00—				
	Apr 1 '33	25.00—	24.00—	23.87—				
	Apr 1 '33	23.38—	24.75—	23.36—				
	Apr 1 '33	31.93—	23.33—	23.09—				
	Apr 1 '33	24.88—	27.37—	36.46—				
	Apr 1 '33	13.75—	20.00—	8.00—				
	Apr 1 '33	25.00—	23.06—	24.75—				
	Apr 1 '33	34.65—	24.75—	24.00—				
	Apr 1 '33	37.80—	25.00—	10.00—				
	Apr 1 '33	22.45—	36.00—	27.00—				
	Apr 1 '33	32.40—	20.00—	8.00—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Apr 1 '33	33.33—	33.33—	33.33—				
	Apr 1 '33	33.33—	51.25—	52.06—				
	Apr 1 '33	52.06—	51.96—	51.17—				
	Apr 1 '33	51.77—	59.87—	56.25—				
	Apr 1 '33	61.69—	62.50—	62.84—				
	Apr 1 '33	62.84—	93.74—	112.50—				
	Apr 1 '33	81.94—	87.01—	50.50—				
	Apr 1 '33	80.94—	105.00—	71.05—				
	Apr 1 '33	47.59—	63.82—	68.91—				
	Apr 1 '33	12.50—	96.65—	112.22—				
	Apr 1 '33	105.61—	105.14—	103.45—				
	Apr 1 '33	47.58—	63.85—	4.18—				
	Apr 1 '33	90.00—	78.58—	81.63—				
	Apr 1 '33	71.03—	90.00—	110.69—				
	Apr 1 '33	99.24—	61.69—	121.08—				
	Apr 1 '33	53.24—	53.17—	177.50—				
	Apr 1 '33	148.99—	156.09—	100.00—				
	Apr 1 '33	104.97—	55.31—	85.37—				
	Apr 1 '33	39.16—	31.66—	50.00—				
	Apr 1 '33	31.66—	31.66—	41.66—				
	Apr 1 '33	31.66—	31.66—	54.16—				
	Apr 1 '33	74.01—	107.06—	94.48—				
	Apr 1 '33	97.98—	96.79—	102.95—				
	Apr 1 '33	206.75—	78.21—	61.69—				
	Apr 1 '33	73.58—	74.40—	105.84—				
	Apr 1 '33	115.76—	159.79—	105.11—				
	Apr 1 '33	30.00—	84.37—	84.37—				
	Apr 1 '33	127.49—	30.00—	105.24—				
	Apr 1 '33	70.33—	74.57—	5.00—				
	Apr 1 '33	100.23—	63.62—	49.53—				
	Apr 1 '33	51.85—	51.52—	65.61—				
	Apr 1 '33	63.28—	67.38—	49.13—				
	Apr 1 '33	66.71—	67.27—	66.85—				
	Apr 1 '33	51.55—	70.83—	78.48—				
	Apr 1 '33	69.98—	158.91—	122.47—				
	Apr 1 '33	77.98—	240.89—	337.88—				
	Apr 1 '33	124.82—	95.15—	112.50—				
	Apr 1 '33	96.85—	128.13—	100.94—				
	Apr 1 '33	176.56—	78.50—	37.12—				
	Apr 1 '33	53.49—	87.84—	307.80—				
	Apr 1 '33	310.12—	242.15—	99.32—				
	Apr 1 '33	222.98—	99.76—	69.56—				
	Apr 1 '33	92.35—	64.25—	86.74—				
	Apr 1 '33	19.51—	19.43—	50.00—				
	Apr 1 '33	56.67—	63.75—	103.61—				
	Apr 1 '33	50.00—	48.89—	84.19—				
	Apr 1 '33	61.60—	56.25—	56.25—				
	Apr 1 '33	56.25—	112.50—	125.32—				
	Apr 1 '33	215.20—	22.69—	113.87—				
	Apr 1 '33	273.44—	98.21—	47.25—				
	Apr 1 '33	77.52—	83.07—	2.14—				
	Apr 1 '33	80.08—	105.11—	96.38—				
	Apr 1 '33	89.29—	96.55—	81.13—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Date	Checks in Detail			Date	Deposits	Date	New Balance
	Balance Brought Forward						
Apr 1 '33	73.20—	104.41—	5.00—				
Apr 1 '33	98.25—	90.33—	4.50—				
Apr 1 '33	69.23—	19.25—	103.47—				
Apr 1 '33	141.87—	106.71—	99.96—				
Apr 1 '33	146.25—	96.15—	94.94—				
Apr 1 '33	170.40—	78.55—	69.59—				
Apr 1 '33	93.64—	67.32—	97.97—				
Apr 1 '33	168.75—	105.94—	101.85—				
Apr 1 '33	94.71—	106.42—	135.33—				
Apr 1 '33	106.65—	105.24—	55.76—				
Apr 1 '33	83.50—	70.74—	91.05—				
Apr 1 '33	106.65—	106.34—	103.54—				
Apr 1 '33	66.74—	92.06—	113.35—				
Apr 1 '33	68.53—	166.20—	127.12—				
Apr 1 '33	88.53—	90.46—	101.25—				
Apr 1 '33	61.09—	88.09—	70.97—				
Apr 1 '33	63.78—	88.54—	114.37—				
Apr 1 '33	62.75—	94.66—	57.44—				
Apr 1 '33	61.60—	128.57—	137.60—				
Apr 1 '33	89.18—	100.42—	166.14—				
Apr 1 '33	140.64—	104.99—	46.25—				
Apr 1 '33	59.64—	28.31—	53.22—				
Apr 1 '33	50.00—	73.93—	113.21—				
Apr 1 '33	103.94—	104.41—	106.24—				
Apr 1 '33	94.00—	95.53—	68.34—				
Apr 1 '33	71.42—	79.65—	153.41—				
Apr 1 '33	163.18—	80.05—	65.26—				
Apr 1 '33	104.10—	135.00—	74.87—				
Apr 1 '33	52.27—	99.53—	89.73—				
Apr 1 '33	101.55—	61.86—	62.89—				
Apr 1 '33	113.97—	85.47—	92.74—				
Apr 1 '33	67.39—	65.62—	107.65—				
Apr 1 '33	107.11—	59.85—	88.87—				
Apr 1 '33	67.29—	67.50—	67.41—				
Apr 1 '33	70.37—	88.69—	106.84—				
Apr 1 '33	110.35—	67.34—	78.74—				
Apr 1 '33	83.09—	56.69—	90.50—				
Apr 1 '33	78.38—	88.97—	93.37—				
Apr 1 '33	4.50—	4.50—	65.18—				
Apr 1 '33	67.73—	51.67—	50.83—				
Apr 1 '33	5.00—	2.50—	24.61—				
Apr 1 '33	2.25—	71.24—	51.67—				
Apr 1 '33	56.12—	70.60—	51.85—				
Apr 1 '33	122.31—	66.85—	66.67—				
Apr 1 '33	66.67—	273.44—	159.51—				
Apr 1 '33	151.84—	122.47—	66.90—				
Apr 1 '33	63.41—	66.78—	66.71—				
Apr 1 '33	66.78—	67.16—	67.01—				
Apr 1 '33	68.08—	79.50—	70.48—				
Apr 1 '33	139.77—	76.27—	117.59—				
Apr 1 '33	92.19—	203.70—	120.71—				
Apr 1 '33	115.02—	74.44—	70.98—				
Apr 1 '33	78.75—	58.52—	78.45—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail		Date	Deposits	Date	New Balance
		Balance Brought Forward					
	Apr 1 '33	22.00	25.00		25.00		
	Apr 1 '33	22.50	36.07		27.00		
	Apr 1 '33	40.95	25.25		25.00		
	Apr 1 '33	27.53	27.00		29.25		
	Apr 1 '33	27.00	27.00		27.00		
	Apr 1 '33	27.43	27.00		30.58		
	Apr 1 '33	25.00	32.00		25.00		
	Apr 1 '33	25.00	29.20		19.62		
	Apr 1 '33	19.25	22.00		25.22		
	Apr 1 '33	22.00	25.00		22.00		
	Apr 1 '33	27.70	36.45		25.00		
	Apr 1 '33	27.25	48.00		36.10		
	Apr 1 '33	22.80	25.00		24.00		
	Apr 1 '33	24.00	20.00		44.10		
	Apr 1 '33	23.63	25.00		23.38		
	Apr 1 '33	25.09	17.32		21.91		
	Apr 1 '33	25.45	25.00		22.69		
	Apr 1 '33	25.00	29.70		36.22		
	Apr 1 '33	23.38	15.00		20.00		
	Apr 1 '33	22.00	27.00		27.22		
	Apr 1 '33	41.81	25.00		23.23		
	Apr 1 '33	15.00	15.00		23.38		
	Apr 1 '33	23.38	25.00		24.00		
	Apr 1 '33	24.00	23.63		25.00		
	Apr 1 '33	29.25	19.57		43.20		
	Apr 1 '33	25.00	27.22		27.50		
	Apr 1 '33	27.00	24.75		25.00		
	Apr 1 '33	24.00	19.94		23.08		
	Apr 1 '33	35.98	27.00		19.25		
	Apr 1 '33	19.25	32.40		2.13		
	Apr 1 '33	2.25	21.00		27.22		
	Apr 1 '33	37.80	26.77		24.75		
	Apr 1 '33	2.39	23.89		22.20		
	Apr 1 '33	22.00	35.10		27.60		
	Apr 1 '33	25.00	27.00		13.75		
	Apr 1 '33	32.52	25.00		29.69		
	Apr 1 '33	27.00	29.70		27.22		
	Apr 1 '33	24.19	5.00		32.13		
	Apr 1 '33	49.76	11.60		5.50		
83,345.05	Apr 1 '33	105.52	77.50		57.67	Apr 1 '33	83,345.05
	Apr 1 '33	116.86	170.99		146.62		
	Apr 1 '33	77.97	82.49		82.49		
	Apr 1 '33	82.49	82.49		27.22		
	Apr 1 '33	211.61	328.13		80.53		
	Apr 1 '33	142.64	226.04		106.95		
	Apr 1 '33	104.26	52.25		52.11		
	Apr 1 '33	51.71	52.15		52.50		
	Apr 1 '33	35.64	35.64		36.22		
	Apr 1 '33	58.08	39.02		31.32		
	Apr 1 '33	33.64	33.33		33.33		

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
			Balance Brought Forward					
	Apr 1 '33	22.69—	27.00—	25.00—				
	Apr 1 '33	29.51—	29.51—					
	Apr 1 '33	32.40—	25.00—	20.63—				
	Apr 1 '33	22.30—	25.00—	25.65—				
	Apr 1 '33	22.50—	23.38—	25.00—				
	Apr 1 '33	25.00—	25.00—	25.00—				
	Apr 1 '33	21.42—	31.20—	25.00—				
	Apr 1 '33	25.00—	23.38—	23.38—				
	Apr 1 '33	25.00—	24.00—	22.00—				
	Apr 1 '33	21.00—	22.78—	16.50—				
	Apr 1 '33	22.00—	21.00—	25.27—				
	Apr 1 '33	22.00—	35.96—	27.00—				
	Apr 1 '33	25.00—						
5,062.96	Apr 1 '33	27.53—	26.43—	22.00—			Apr 1 '33	95,062.96—
	Apr 1 '33	19.25—	24.75—	20.00—				
	Apr 1 '33	32.40—	180.00—	31.20—				
	Apr 1 '33	20.00—	25.00—	29.25—				
	Apr 1 '33	27.00—	32.40—	29.70—				
	Apr 1 '33	28.50—	25.20—	25.00—				
	Apr 1 '33	25.10—	24.00—	24.00—				
	Apr 1 '33	2.25—	2.25—	29.70—				
	Apr 1 '33	24.96—	43.06—	8.96—				
	Apr 1 '33	147.73—	53.30—	491.67—				
	Apr 1 '33	64.66—	78.51—	28.88—				
	Apr 1 '33	416.76—	438.22—	21.80—				
	Apr 1 '33	7.14—	81.76—	26.36—				
	Apr 1 '33	156.00—	7.88—	181.58—				
	Apr 1 '33	18.42—	13.37—	35.25—				
	Apr 1 '33	18.96—	167.73—	233.14—				
	Apr 1 '33	82.68—	5.33—	46.14—				
	Apr 1 '33	111.34—	43.06—	88.53—				
	Apr 1 '33	17.52—	109.88—	64.71—				
	Apr 1 '33	61.16—	37.80—	2.40—				
	Apr 1 '33	29.51—	196.99—	199.30—				
	Apr 1 '33	280.94—	258.68—	2.59—				
	Apr 1 '33	20.51—	255.74—	198.01—				
	Apr 1 '33	20.51—	4.07—	223.16—				
	Apr 1 '33	181.58—	18.96—	18.42—				
	Apr 1 '33	13.37—	7.88—	167.73—				
	Apr 1 '33	35.25—	82.68—	5.33—				
	Apr 1 '33	46.14—	53.30—	64.66—				
	Apr 1 '33	496.67—	400.69—	142.39—				
	Apr 1 '33	7.14—	21.80—	26.36—				
	Apr 1 '33	98.22—	81.76—	61.16—				
	Apr 1 '33	156.66—	28.88—	109.88—				
	Apr 1 '33	78.51—	88.53—	17.52—				
	Apr 1 '33	111.34—	64.71—	61.69—				
	Apr 1 '33	37.80—	61.69—	37.80—				
	Apr 1 '33	27.00—	19.25—	32.34—				
	Apr 1 '33	29.25—	23.47—	25.00—				
	Apr 1 '33	27.00—	15.00—	25.00—				
	Apr 1 '33	19.99—	34.93—	32.40—				
	Apr 1 '33	27.00—	21.00—	33.06—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Apr 1 '33	87.97	84.05	63.88				
	Apr 1 '33	73.48	87.42	68.86				
	Apr 1 '33	92.59	92.07	126.13				
	Apr 1 '33	57.78	103.68	71.08				
	Apr 1 '33	70.55	205.90	58.46				
	Apr 1 '33	57.44	120.39	57.47				
	Apr 1 '33	74.36	75.28	87.67				
	Apr 1 '33	121.15	120.29	112.53				
	Apr 1 '33	69.66	79.60	69.59				
	Apr 1 '33	79.32	50.00	82.04				
	Apr 1 '33	53.13	84.08	59.51				
	Apr 1 '33	61.82	79.99	33.33				
	Apr 1 '33	63.90	51.11	99.92				
	Apr 1 '33	99.87	71.30	112.50				
	Apr 1 '33	80.53	135.93					
	Apr 1 '33	78.72	68.18	117.43				
	Apr 1 '33	44.75	132.97	62.43				
	Apr 1 '33	72.85	107.04	53.57				
	Apr 1 '33	53.93	50.88	207.43				
	Apr 1 '33	57.14	82.70	51.35				
	Apr 1 '33	62.12	68.27	41.66				
	Apr 1 '33	36.66	106.57	63.89				
	Apr 1 '33	95.30	103.47	76.30				
	Apr 1 '33	112.50	146.96	93.74				
	Apr 1 '33	54.16	33.33	43.33				
	Apr 1 '33	54.16	90.74	108.70				
	Apr 1 '33	117.59	57.15	76.25				
	Apr 1 '33	82.93	88.20	84.67				
	Apr 1 '33	123.94	80.77	93.84				
	Apr 1 '33	108.38	102.87	78.29				
	Apr 1 '33	43.60	108.75	114.85				
	Apr 1 '33	56.74	43.60	51.46				
	Apr 1 '33	53.90	54.90	77.25				
	Apr 1 '33	63.82	93.10	101.34				
	Apr 1 '33	96.65	74.87	96.21				
	Apr 1 '33	61.95	59.87	75.00				
	Apr 1 '33	78.75	88.66	56.79				
	Apr 1 '33	57.49	56.25	56.25				
	Apr 1 '33	301.95	63.59	101.34				
	Apr 1 '33	124.06	106.99	29.70				
	Apr 1 '33	100.79	82.50	44.16				
	Apr 1 '33	76.54	97.84	132.64				
	Apr 1 '33	99.76					Apr 1 '33	42,437.81
42,437.81	Apr 1 '33	233.14			Apr 1 '33	233.14	**Apr 1 '33	42,447.81
42,447.81	Apr 1 '33	96.36			Apr 1 '33	96.38	**Apr 1 '33	42,447.83
42,447.83	Apr 1 '33	168.75			Apr 1 '33	108.75	**Apr 1 '33	42,387.83
42,387.83	Apr 1 '33	96.55			Apr 1 '33	96.65	**Apr 1 '33	42,387.93
42,387.93	Apr 3 '33	25.00	29.25	67.50				
	Apr 3 '33	25.00	10.00	50.00				
	Apr 3 '33	78.25	25.00	72.36				

** Pencilled line drawn through these deposit items on original exhibit

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
			Balance Brought Forward					
	Apr 3 '33	27.20—	27.20—	25.00—				
	Apr 3 '33	27.00—	93.74—	22.69—				
	Apr 3 '33	24.75—	31.97—					
	Apr 3 '33	35.01—	25.08—	23.80—				
	Apr 3 '33	23.29—	24.75—	15.00—				
	Apr 3 '33	20.00—	15.00—	25.00—				
	Apr 3 '33	10.00—	25.35—	27.00—				
	Apr 3 '33	85.52—	60.08—	21.75—				
	Apr 3 '33	90.36—	38.98—	36.50—				
	Apr 3 '33	27.00—	27.22—	25.00—				
	Apr 3 '33	16.50—	5.00—	4.76—				
	Apr 3 '33	4.26—	60.74—	22.25—				
	Apr 3 '33	39.04—	30.04—	25.00—				
	Apr 3 '33	25.00—	95.92—	75.00—				
	Apr 3 '33	50.00—	2.50—	24.75—				
	Apr 3 '33	340.79—	24.75—	50.34—				
	Apr 3 '33	115.90—	29.70—					
40,010.59	Apr 4 '33	122.54—	3.00—	2.75—			Apr 3 '33	40,010.59*—
	Apr 4 '33	2.75—	3.00—	3.00—				
	Apr 4 '33	3.00—	3.30—	3.00—				
	Apr 4 '33	5.00—	4.81—	155.17—				
	Apr 4 '33	32.40—	49.76—	91.10—				
	Apr 4 '33	251.63—	117.38—	131.34—				
	Apr 4 '33	67.37—	85.70—	2.25—				
	Apr 4 '33	52.45—	810.14—	1,001.41—				
	Apr 4 '33	4.25—	844.78—	390.60—				
	Apr 4 '33	12.50—	74.58—	91.77—				
	Apr 4 '33	10.42—	113.34—	12.50—				
	Apr 4 '33	168.30—	229.30—	155.86—				
	Apr 4 '33	50.00—	125.64—	41.26—				
	Apr 4 '33	84.00—	104.36—	182.08—				
	Apr 4 '33	72.07—	736.65—	219.43—				
	Apr 4 '33	25.00—	43.75—	14.17—				
	Apr 4 '33	94.17—	15.00—	52.91—				
	Apr 4 '33	23.01—	10.84—	239.13—				
	Apr 4 '33	23.39—	93.74—	15.31—				
	Apr 4 '33	15.00—	80.05—	105.36—				
	Apr 4 '33	20.00—	82.49—	49.33—				
	Apr 4 '33	82.49—	22.50—	71.38—				
	Apr 4 '33	32.40—	22.00—	91.05—				
	Apr 4 '33	150.93—	262.04—	257.25—				
	Apr 4 '33	49.33—	222.98—	18.75—				
30,664.83	Apr 4 '33	104.35—					Apr 4 '33	30,664.83*—
	Apr 4 '33	242.07—	22.50—	67.50—	Apr 4 '33	104.36	**Apr 4 '33	30,664.84*—
30,664.84	Apr 5 '33	76.25—	63.16—	5.65—				
	Apr 5 '33	21.55—	5.65—	4.90—				
	Apr 5 '33	1.76—	20.02—	3.41—				
	Apr 5 '33	5.60—	4.90—	1.76—				
	Apr 5 '33	21.55—	20.02—	3.41—				
	Apr 5 '33	5.60—	8.97—	8.97—				
	Apr 5 '33	25.21—	103.94—	22.00—				

*Pencilled line drawn through this deposit item on original exhibit.

Plaintiff's Exhibit 7.

First National Bank and Trust Company

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
		25.00—	22.00—	25.00—				
		25.00—	27.00—	25.00—				
		27.00—	27.00—	25.00—				
		25.00—	25.00—	25.00—				
		25.00—	24.75—	25.00—				
		24.57—						
			25.00—	25.00—				
		25.00—	21.14—	27.25—				
		19.25—	25.00—	27.00—				
		27.00—	33.61—	40.95—				
		25.00—	27.00—	29.25—				
		27.00—	27.00—	27.00—				
		24.75—	25.00—	25.00—				
		28.00—	29.70—	25.00—				
		27.00—	27.22—	27.00—				
		22.00—	11.00—	16.50—				
		25.00—	27.00—	37.80—				
		25.00—	25.00—	25.00—				
		23.16—	25.00—	25.00—				
		27.00—	25.00—	25.00—				
		25.00—	22.25—	27.22—				
		23.23—	27.00—	29.00—				
		27.00—	27.00—	27.00—				
	Apr 8 '33	27.00—	27.00—	27.00—				
		29.25—	32.40—	27.00—				
		29.25—	31.98—	27.00—				
		23.36—	23.26—	23.06—				
		25.00—	22.25—	25.00—				
		25.00—	27.00—	33.06—				
		34.65—	34.65—	25.00—				
		25.00—	25.00—	27.22—				
		25.00—	29.70—	24.15—				
		27.90—	25.00—	25.00—				
		25.00—	27.00—	26.14—				
		25.00—	25.00—	27.00—				
		25.00—	6.00—	25.00—				
		27.00—	25.00—	25.00—				
	Apr 8 '33	25.00—	20.00—	16.50—				
	Apr 8 '33	24.00—	27.96—	29.25—				
	Apr 8 '33	27.00—	27.00—	27.88—				
	Apr 8 '33	25.00—	27.00—	34.65—				
	Apr 8 '33	25.99—	25.00—	25.00—				
	Apr 8 '33	29.70—	27.00—	22.00—				
	Apr 8 '33	22.00—	48.09—	27.22—				
	Apr 8 '33	25.00—	27.00—	24.19—				
	Apr 8 '33	25.00—	26.06—	34.94—				
	Apr 8 '33	27.00—	27.00—	27.22—				
	Apr 8 '33	22.00—	35.10—	11.00—				
	Apr 8 '33	29.25—	15.00—	25.00—				
	Apr 8 '33	23.06—	27.00—	26.43—				
	Apr 8 '33	27.88—	29.25—	27.22—				
	Apr 8 '33	27.22—	25.00—	25.00—				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
			Balance Brought Forward					
	Apr 8 '33	27.00	25.62	24.88				
	Apr 8 '33	25.00	27.00	25.48				
	Apr 8 '33	25.00	29.70	27.00				
	Apr 8 '33	25.03	24.96	25.21				
	Apr 8 '33	27.19	27.00	25.00				
	Apr 8 '33	23.06	25.00	11.00				
	Apr 8 '33	31.50	27.00	27.00				
	Apr 8 '33	25.00	25.00	25.00				
	Apr 8 '33	20.27	25.00	25.00				
	Apr 8 '33	25.00	27.00	25.00				
	Apr 8 '33	37.80	25.69	31.50				
	Apr 8 '33	25.00	25.00	25.00				
	Apr 8 '33	25.00	25.00	25.00				
	Apr 8 '33	27.00	30.37	25.00				
	Apr 8 '33	32.40	35.58	24.59				
	Apr 8 '33	29.70	29.70	27.00				
	Apr 8 '33	25.00	25.00	25.00				
	Apr 8 '33	27.00	16.50	25.00				
	Apr 8 '33	27.00	25.07	25.00				
	Apr 8 '33	25.00	23.49	16.50				
	Apr 8 '33	16.50	25.00	25.00				
	Apr 8 '33	22.00	27.00	25.00				
	Apr 8 '33	28.35	25.62	27.00				
	Apr 8 '33	25.00	23.09	25.00				
	Apr 8 '33	25.00	27.00	25.00				
	Apr 8 '33	27.00	27.27	27.00				
	Apr 8 '33	27.00	37.80	28.03				
	Apr 8 '33	34.65	27.00	25.00				
	Apr 8 '33	27.22	27.00	27.00				
	Apr 8 '33	25.00	27.00	28.01				
	Apr 8 '33	15.00	26.90	31.50				
	Apr 8 '33	25.00	27.00	28.26				
	Apr 8 '33	25.00	26.56	24.96				
	Apr 8 '33	25.51	27.00	25.00				
	Apr 8 '33	32.40	19.25	25.00				
	Apr 8 '33	27.00	23.31	25.00				
	Apr 8 '33	25.03	23.33	25.00				
	Apr 8 '33	25.00	29.25	25.00				
	Apr 8 '33	25.00	25.00	25.00				
	Apr 8 '33	25.00	20.00	34.65				
	Apr 8 '33	31.50	25.00	25.00				
	Apr 8 '33	25.00	25.00	19.25				
	Apr 8 '33	44.10	22.00	22.42				
	Apr 8 '33	20.00	27.00	25.00				
	Apr 8 '33	27.00	25.00	27.00				
	Apr 8 '33	37.80	25.00	35.54				
	Apr 8 '33	21.88	26.61	25.00				
	Apr 8 '33	29.66	25.00	25.00				
	Apr 8 '33	25.00	20.00	25.00				
	Apr 8 '33	25.00	36.00	27.00				
	Apr 8 '33	15.00	27.00	32.40				
	Apr 8 '33	17.50	27.00	20.00				
	Apr 8 '33	20.00	27.00	27.00				
	Apr 8 '33	25.00	25.00	27.00				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New B
		Balance Brought Forward						
	Apr 5 '33	23.79	32.40	2.60				
	Apr 5 '33	3.00	3.00	3.00				
	Apr 5 '33	3.00	3.00	3.25				
	Apr 5 '33	3.25	3.25	3.25				
	Apr 5 '33	32.40	73.65				Apr 5 '33	30,037
30,037.72	Apr 6 '33	24.00	29.70	24.75				
	Apr 6 '33	3.03	2.75	2.75				
	Apr 6 '33	2.75	2.75	2.75				
	Apr 6 '33	22.00	56.25	56.25				
	Apr 6 '33	56.25	29.70	25.00				
	Apr 6 '33	3.03	3.03	3.03				
	Apr 6 '33	3.03	23.06	82.49				
	Apr 6 '33	10.00	116.64				Apr 6 '33	29,452
29,452.73	Apr 7 '33	29.70	25.00	26.12				
	Apr 7 '33	27.00	24.75	27.00				
	Apr 7 '33	29.70	25.00	25.00				
	Apr 7 '33	27.22	27.00	29.70				
	Apr 7 '33	25.00	27.00	25.00				
	Apr 7 '33	25.00	25.00	36.00				
	Apr 7 '33	27.00	25.00	25.00				
	Apr 7 '33	38.50	25.00	26.28				
	Apr 7 '33	25.00	25.00	29.25				
	Apr 7 '33	27.96	33.75	27.00				
	Apr 7 '33	22.25	27.25	31.50				
	Apr 7 '33	25.00	26.40	27.00				
	Apr 7 '33	29.25	27.00	27.00				
	Apr 7 '33	50.40	29.25	27.00				
	Apr 7 '33	32.40	27.00	27.00				
	Apr 7 '33	32.40	32.40	35.10				
	Apr 7 '33	29.70	30.58	27.00				
	Apr 7 '33	37.80	32.40	29.25				
	Apr 7 '33	36.45	29.20	27.00				
	Apr 7 '33	25.00	25.54	27.00				
	Apr 7 '33	25.00	25.00	23.06				
	Apr 7 '33	23.06	25.00	25.00				
	Apr 7 '33	22.63	25.00	11.00				
	Apr 7 '33	30.73	25.00	28.03				
	Apr 7 '33	27.73	25.00	27.00				
	Apr 7 '33	15.33	27.00	28.00				
	Apr 7 '33	25.00	27.00	25.45				
	Apr 7 '33	27.00	29.25	27.00				
	Apr 7 '33	27.00	27.00	27.00				
	Apr 7 '33	25.00	25.56	27.00				
	Apr 7 '33	27.88	22.25	25.57				
	Apr 7 '33	25.00	27.00	25.00				
	Apr 7 '33	22.43	27.00	27.88				
	Apr 7 '33	11.00	28.97	31.20				
	Apr 7 '33	27.00	27.00	27.00				
	Apr 7 '33	27.00	28.09	25.48				
	Apr 7 '33	27.00	27.00	25.00				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
	Apr 7 '33	25.00—	27.00—	25.00—				
	Apr 7 '33	27.00—	27.00—	9.22—				
302.48	Apr 7 '33	27.22—	12.00—	25.00—			Apr 7 '33	26,302.48*
	Apr 7 '33	27.22—	7.50—	7.50—				
	Apr 7 '33	7.50—	3.00—	3.00—				
	Apr 7 '55	3.00—	3.00—	3.00—				
	Apr 7 '33	3.00—	3.00—	2.75—				
	Apr 7 '33	2.75—	2.75—	2.75—				
	Apr 7 '33	2.75—	3.90—	3.90—				
	Apr 7 '33	3.90—	3.90—	3.90—				
	Apr 7 '33	2.75—	3.00—	3.00—				
	Apr 7 '33	3.00—	2.70—	3.15—				
	Apr 7 '33	1.50—	2.70—	4.20—				
	Apr 7 '33	4.20—	4.20—	3.50—				
	Apr 7 '33	4.20—	2.75—	1.93—				
	Apr 7 '33	2.75—	2.75—	2.75—				
	Apr 7 '33	2.75—	2.75—	2.75—				
	Apr 7 '33	2.75—	8.75—	8.75—				
	Apr 7 '33	3.00—	3.00—	3.00—				
	Apr 7 '33	3.00—	3.00—	24.75—				
	Apr 7 '33	78.29—	11.25—	11.25—				
	Apr 7 '33	11.25—	7.50—	3.50—				
	Apr 7 '33	5.61—	3.50—	4.20—				
	Apr 7 '33	3.50—	2.75—	2.48—				
	Apr 7 '33	2.75—	2.75—	2.48—				
	Apr 7 '33	2.75—	2.75—	17.50—				
	Apr 7 '33	17.50—	17.50—	17.50—				
	Apr 7 '33	25.00—	27.00—	27.00—				
	Apr 7 '33	25.00—	25.00—	25.00—				
	Apr 7 '33	27.22—	29.35—	25.00—				
	Apr 7 '33	28.26—	27.81—	37.80—				
	Apr 7 '33	160.00—	27.57—	27.00—				
	Apr 7 '33	25.00—	23.06—	25.06—				
167.32	Apr 7 '33	29.25—					**Apr 7 '33	25,167.32*
167.42		25.00—	25.00—	22.00—	Apr 7 '33	29.35	Apr 7 '33	25,167.42*
		25.00—	27.00—	24.96—				
		25.00—	29.25—	24.01—				
		27.00—	15.00—	27.00—				
		25.00—	15.00—	15.00—				
		20.00—	20.00—	34.65—				
		27.00—	33.66—	26.53—				
		20.00—	20.00—	3.46—				
		3.46—	3.46—	7.41—				
		7.41—	7.41—	3.04—				
		3.04—	3.04—	1.79—				
		1.79—	.55—	.55—				
		.55—	2.58—	2.58—				
		2.58—	4.70—	4.70—				
		4.70—	64.33—	64.33—				
		64.33—	25.00—	27.00—				
		27.00—	32.40—	27.00—				
		27.35—	27.22—	25.00—				
		27.00—	29.25—	26.44—				

**Spilled line drawn through this deposit item on original exhibit.

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New
		Balance Brought Forward						
	Apr 8 '33	23.63	22.00	24.96				
	Apr 8 '33	20.00	24.00	23.87				
	Apr 8 '33	22.00	29.25	34.93				
	Apr 8 '33	27.00	22.00	27.22				
	Apr 8 '33	25.00	27.00	25.00				
	Apr 8 '33	23.33	25.00	28.09				
	Apr 8 '33	29.70	22.00	25.00				
	Apr 8 '33	29.70	20.00	25.00				
	Apr 8 '33	29.61	15.00	25.00				
	Apr 8 '33	22.00	16.50	33.60				
	Apr 8 '33	24.00	26.00	27.00				
	Apr 8 '33	16.50	23.06					
	Apr 8 '33	15.00	36.32	25.00				
	Apr 8 '33	10.00	10.60	22.00				
	Apr 8 '33	22.00	20.00	20.00				
	Apr 8 '33	30.00	31.86	25.00				
	Apr 8 '33	19.25	33.47	27.37				
	Apr 8 '33	19.25	27.00	25.00				
	Apr 8 '33	27.00	25.00	15.00				
	Apr 8 '33	25.00	11.00	27.22				
	Apr 8 '33	26.00	15.00	24.00				
	Apr 8 '33	25.00	25.69	22.00				
	Apr 8 '33	25.00	27.00	27.00				
	Apr 8 '33	25.00	29.70	25.00				
	Apr 8 '33	27.00	27.86	27.00				
	Apr 8 '33	27.00	25.00	25.35				
	Apr 8 '33	25.00	27.00	25.00				
	Apr 8 '33	25.00	25.00	25.00				
	Apr 8 '33	24.00	25.00	25.00				
	Apr 8 '33	25.00	32.40	25.00				
	Apr 8 '33	24.00	27.00	25.00				
	Apr 8 '33	25.00	18.00	27.00				
	Apr 8 '33	31.56	25.00	27.00				
	Apr 8 '33	27.00	25.00	24.59				
	Apr 8 '33	32.11	25.00	32.40				
	Apr 8 '33	25.00	37.80	37.80				
	Apr 8 '33	25.00	35.04	25.00				
	Apr 8 '33	27.00	25.00	24.00				
	Apr 8 '33	27.00	27.00	25.00				
	Apr 8 '33	24.00	25.00	40.95				
	Apr 8 '33	20.63	10.00	15.00				
	Apr 8 '33	30.61	27.00	25.00				
	Apr 8 '33	25.00	23.09	27.00				
	Apr 8 '33	25.00	27.00	25.00				
	Apr 8 '33	25.00	24.75	27.00				
	Apr 8 '33	25.00	25.90	25.00				
	Apr 8 '33	25.00	25.00	20.00				
	Apr 8 '33	25.00	27.00	27.22				
	Apr 8 '33	11.00	25.00	27.00				
	Apr 8 '33	27.00	35.79	25.00				
	Apr 8 '33	29.70	24.00	29.51				
	Apr 8 '33	25.00	27.00	25.00				
	Apr 8 '33	29.70	27.00	24.09				
	Apr 8 '33	27.00	27.00	25.57				

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Date	Checks in Detail			Date	Deposits	Date	New Balance
	Balance Brought Forward						
Apr 8 '33	25.00—						
Apr 8 '33	27.00—	22.00—	25.00—				
Apr 8 '33	25.00—	25.00—	28.01—				
Apr 8 '33	32.34—	22.69—	27.00—				
Apr 8 '33	23.78—	27.22—	5.00—				
Apr 8 '33	25.00—						
Apr 8 '33	1.79—					Apr 8 '33	11,482.33*—
				Apr 8 '33	25.00**		
				Apr 8 '33	27.25**		
				Apr 8 '33	20.27**		
Apr 8 '33	7.00—	22.27—				Apr 8 '33	11,503.79*—
Apr 10 '33	25.00—	27.00—	27.00—				
Apr 10 '33	37.80—	37.80—	28.50—				
Apr 10 '33	25.45—	32.40—	29.70—				
Apr 10 '33	36.69—	35.87—	17.86—				
Apr 10 '33	37.80—	27.00—	27.00—				
Apr 10 '33	29.70—	25.00—	25.00—				
Apr 10 '33	25.00—	22.00—	27.00—				
Apr 10 '33	27.00—	29.70—					
Apr 10 '33	27.00—	25.00—	18.00—				
Apr 10 '33	25.00—	27.00—	27.00—				
Apr 10 '33	31.66—	25.00—	25.00—				
Apr 10 '33	27.00—	41.81—	23.29—				
Apr 10 '33	27.00—	25.00—	27.00—				
Apr 10 '33	20.00—	25.00—	27.00—				
Apr 10 '33	4.81—	25.00—	27.00—				
Apr 10 '33	5.50—	19.86—	2.13—				
Apr 11 '33	82.49—	25.00—	22.00—			Apr 10 '33	10,282.46*—
Apr 11 '33	25.25—	25.35—	37.80—				
Apr 11 '33	25.00—	25.00—	27.00—				
Apr 11 '33	33.49—	27.22—	27.00—				
Apr 11 '33	2.75—	192.69—				Apr 11 '33	9,704.42*—
Apr 12 '33	10.00—	24.25—	5.00—				
Apr 12 '33	1,696.17—					Apr 12 '33	7,969.00*—
Apr 13 '33	27.00—	25.00—	25.00—				
Apr 13 '33	25.00—					Apr 13 '33	7,867.00*—
14 '33	16.82—	5.00—	32.40—				
14 '33	29.25—	8.25—	24.88—				
14 '33	25.00—					14 '33	7,725.40*—
Apr 15 '33	1.79—	2.58—	55—				
Apr 15 '33	4.70—	3.04—	7.41—				
Apr 15 '33	3.46—	22.50—	25.00—				
Apr 15 '33	25.00—	2.00—				Apr 15 '33	7,627.37*—
Apr 17 '33	15.00—	2.25—	15.00—			Apr 17 '33	7,595.12*—
Apr 18 '33	58.33—	25.00—	23.06—				
Apr 18 '33	37.50—	25.00—				Apr 18 '33	7,426.23*—
Apr 19 '33	25.00—	27.22—	71.36—			Apr 19 '33	7,302.65*—

ed line drawn through these deposit items on original exhibit.

Plaintiff's Exhibit 7.

First National Bank and Trust Company

Yonkers, N. Y.

Name Treasurer City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New B
		Balance Brought Forward						
7,302.65	Apr 20 '33	5.33—	131.45—	7.88—				
	Apr 20 '33	98.22—	7.14—	420.46—				
	Apr 20 '33	401.67—	64.66—	35.23—				
	Apr 20 '33	18.96—	13.37—	175.86—				
	Apr 20 '33	116.47—	18.42—	109.88—				
	Apr 20 '33	88.53—	43.06—	17.52—				
	Apr 20 '33	64.71—	78.51—	61.16—				
	Apr 20 '33	28.88—	167.73—	251.96—				
	Apr 20 '33	20.51—	3.40—	194.97—				
	Apr 20 '33	256.59—	.45—	20.51—				
	Apr 20 '33	193.43—	243.99—	.55—				
	Apr 20 '33	20.51—	193.19—	46.14—				
	Apr 20 '33	219.80—	53.30—	8.96—				
	Apr 20 '33	82.68—	26.36—	21.80—				
	Apr 20 '33	81.76—	156.66—	20.02—				
	Apr 20 '33	8.97—	5.60—	5.65—				
	Apr 20 '33	3.41—	1.76—	21.55—				
	Apr 20 '33	4.90—			Apr 20 '33		Apr 20 '33	2,87
.00*								
2,870.15	Apr 21 '33	67.50—	27.00—	9.17—				
	Apr 21 '33	9.17—	9.17—	9.17—				
	Apr 21 '33	9.17—	9.17—	9.17—				
	Apr 21 '33	3.00—	3.00—	11.67—	Apr 21 '33			
	Apr 21 '33	11.67—	11.67—	11.67—				
	Apr 21 '33	11.67—					Apr 21 '33	2,647
2,647.11	Apr 22 '33	16.67—	9.75—	4.31—				
	Apr 22 '33	4.14—	3.25—	3.25—				
	Apr 22 '33	3.25—	3.25—	3.00—				
	Apr 22 '33	3.00—	3.00—	3.00—				
	Apr 22 '33	3.00—	3.00—	3.00—				
	Apr 22 '33	3.00—	3.25—	3.25—				
	Apr 22 '33	2.48—	2.75—	2.75—				
	Apr 22 '33	2.75—	10.00—	10.00—				
	Apr 22 '33	3.30—	3.60—	3.00—				
	Apr 22 '33	3.00—	12.50—	12.50—				
	Apr 22 '33	3.60—	3.60—	3.60—				
	Apr 22 '33	3.60—	16.67—	7.18—			Apr 22 '33	2,46
2,461.86	Apr 24 '33	29.41—		.02—			Apr 24 '33	2,43
2,432.43					Apr 24 '33	.02**	Apr 24 '33	2,43
2,432.45	Apr 25 '33	2.25—					Apr 25 '33	2,43
2,430.20	Apr 26 '33	9.75—	9.75—	2.93—				
	Apr 26 '33	3.25—	3.25—	3.25—				
	Apr 26 '33	3.58—	2.54—	2.75—				
	Apr 26 '33	2.75—	2.48—	2.75—				
	Apr 26 '33	10.00—	10.00—	2.40—				
	Apr 26 '33	3.00—	3.00—	3.00—				
	Apr 26 '33	3.30—	12.50—	12.50—				

** Pencilled line drawn through this deposit item on original exhibit.

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

Date	Checks in Detail			Date	Deposits	Date	New Balance
	Balance Brought Forward						
Apr 26 '33	16.67—	2.37—	27.00—				
Apr 27 '33	257.29—					Apr 26 '33	2,275.43*—
Apr 28 '33	16.50—					Apr 27 '33	2,018.14*—
Apr 29 '33	25.00—	16.67—				Apr 28 '33	2,001.64*—
						Apr 29 '33	1,959.97*—
May 2 '33	2.50—	2.50—	2.41—				
May 2 '33	27.00—					May 2 '33	1,925.56*—
May 3 '33	1.25—					May 3 '33	1,924.31*—
May 4 '33	3.50—	2.75—				May 4 '33	1,918.06*—
May 5 '33	2.50—	3.90—	.99—				
May 5 '33	2.75—	4.20—	6.00—				
May 5 '33	2.39—					May 5 '33	1,895.32*—
May 6 '33	27.00—	3.60—	.70—				
May 6 '33	.59—	2.50—				May 5 '33	1,893.33*—
May 8 '33	3.03—	3.25—	3.30—				
May 8 '33	64.33—					May 6 '33	1,860.94*—
May 9 '33	2.55—	2.48—	1.93—			May 8 '33	1,785.03*—
May 9 '33	3.00—	3.00—					
May 9 '33	2.34—					May 9 '33	1,774.07*—
May 10 '33	3.25—	2.75—	3.00—			May 9 '33	1,771.73*—
May 10 '33	2.75—	25.00—					
May 11 '33	27.00—	2.41—				May 10 '33	1,734.98*—
May 15 '33	47.25—					May 11 '33	1,705.57*—
May 17 '33	30.61—					May 15 '33	1,658.32*—
May 20 '33	27.22—					May 17 '33	1,627.71*—
May 23 '33	1.96—	7.69—				May 20 '33	1,600.49*—
May 24 '33	24.00—	29.70—	27.00—			May 23 '33	1,590.84*—
						May 24 '33	1,510.14*—
Jun 9 '33	37.50—						
Jun 10 '33	145.13—					Jun 9 '33	1,472.64*—
				Jun 10 '33	.02**	Jun 10 '33	1,327.49*—
Jun 14 '33	25.00—					Jun 10 '33	1,327.51*—
Jun 28 '33	27.90—					Jun 14 '33	1,302.51*—
Jun 30 '33	25.00—	15.00—	20.00—			Jun 28 '33	1,274.61*—
Jun 30 '33	27.00—	20.00—	15.00—				
						Jun 30 '33	1,152.61*—
Jul 1 '33	20.00—	25.00—	22.00—				
Jul 1 '33	25.00—	25.00—	25.00—				
Jul 1 '33	15.00—	25.00—	25.00—				
Jul 1 '33	25.00—	20.00—	15.00—				
Jul 3 '33	20.00—	20.00—	15.00—			Jul 1 '33	885.61*—
Jul 3 '33	27.00—	20.00—	15.00—				
Jul 3 '33	15.00—					Jul 3 '33	753.61*—

** line drawn through this deposit item on original exhibit.

Plaintiff's Exhibit 8.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Treasurer City of Yonkers

July 3, 1933 to September 10, 1933

Conservators No. A 8658

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New
			Balance Brought Forward ☞					
753.61	Jul 5 '33	15.00—	25.00—	11.67—				
	Jul 5 '33	11.67—	15.00—	15.00—				
	Jul 5 '33	15.00—	20.00—				Jul 5 '33	6
625.27	Jul 6 '33	20.00—	8.50—	15.00—				
	Jul 6 '33	20.00—	20.00—	15.00—			Jul 6 '33	5
526.77	Jul 7 '33	20.00—	20.00—				Jul 7 '33	4
486.77	Jul 8 '33	25.00—	15.00—	15.00—				
	Jul 8 '33	20.00—	20.00—				Jul 8 '33	3
391.77	Jul 10 '33	20.00—	15.00—	20.00—			Jul 10 '33	3
336.77	Jul 13 '33	15.00—					Jul 13 '33	3
321.77	Jul 17 '33	20.00—					Jul 17 '33	3
301.77	Jul 22 '33	20.00					Jul 22 '33	2
281.77	Jul 24 '33	2.19—					Jul 24 '33	2
279.58	Jul 26 '33	25.00—					Jul 26 '33	2
254.58	Jul 27 '33	3.00—	3.00—	3.00—				
	Jul 27 '33	3.00—	2.70—				Jul 27 '33	2
39.88	Jul 28 '33	9.17—	9.17—		Jul 28 '33	.04**—	Jul 28 '33	
21.54	Aug 10 '33	9.00—					Aug 10 '33	
212.54							Aug 10 '33	2
212.54	Sep 5 '33	24.00—					Sep 5 '33	1
188.54	Sep 6 '33	2.35—					Sep 6 '33	1

** Pencilled line drawn through this deposit item on original exhibit.

Plaintiff's Exhibit 9.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name City of Yonkers

May 23, 1933 to July 21, 1933

Conservators No. A 9674

Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
2.84								
2.84	May 23 '33	5.50—	42.50—				May 25 '32	1,502.84*—
4.84	Jul 7 '33	25.00—	25.00—	25.00—			May 23 '33	1,454.84*—
	Jul 7 '33	25.00—	20.00—	15.00—				
	Jul 7 '33	27.00—	29.70—	25.00—				
	Jul 7 '33	15.00—	22.00—					
1.14	Jul 8 '33	20.00—	20.00—	25.00—			Jul 7 '33	1,201.14*—
	Jul 8 '33	20.00—	20.00—	25.00—				
	Jul 8 '33	15.00—	20.00—	15.00—				
	Jul 8 '33	15.00—	25.00—	25.00—				
	Jul 8 '33	27.00—	15.00—	25.00—				
	Jul 8 '33	25.00—	20.00—	25.00—				
	Jul 8 '33	25.00—	25.00—	20.00—				
	Jul 8 '33	20.00—						
9.14	Jul 10 '33	20.00—	20.00—	20.00—			Jul 8 '33	729.14*—
	Jul 10 '33	25.00—	20.00—	25.00—				
	Jul 10 '33	27.00—	15.00—					
7.14	Jul 11 '33	20.00—	15.00—	15.00—			Jul 10 '33	557.14*—
	Jul 11 '33	25.00—	20.00—	15.34—				
	Jul 11 '33	15.00—	15.00—	20.00—				
3.80	Jul 12 '33	15.00—	22.00—	15.00—			Jul 11 '33	396.80*—
	Jul 12 '33	25.00—	15.00—	27.00—				
	Jul 12 '33	25.00—	20.00—					
2.80	Jul 13 '33	15.00—	22.80—	25.00—			Jul 12 '33	232.80*—
	Jul 13 '33	15.00—	25.00—	20.00—				
0.00	Jul 13 '33	20.00—	20.00—	20.00—			Jul 13 '33	110.00*—
0.00	Jul 14 '33	25.00—					Jul 14 '33	50.00*—
5.00	Jul 21 '33	25.00—					Jul 18 '33	25.00*—
							Jul 21 '33	.00*—

Plaintiff's Exhibit 10.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

Name Nepperhan Sewer Fund City of Yonkers

Conservators No. A 6150

Old Balance	Date	Checks in Detail	Date	Deposits	Date	New
		Balance Brought Forward				
					Mar 25 '32	365
365,046.92			Mar 31 In	356.34	Mar 31 In	365
365,403.26			Apr 29 '32	618.86	Apr 29 '32	366
366,022.12	May 26 '32	345,000.00—			May 26 '32	21
21,022.12			May 28 In	599.89	May 28 In	21
21,622.01			Jun 30 In	36.52	Jun 30 In	21
21,658.53			Jul 29 In	35.34	Jul 29 In	21
21,693.87			Aug 30 In	36.58	Aug 30 In	21
21,730.45			Sep 29 In	36.73	Sep 29 In	21
21,767.18			Oct 24 '32	4,050.00	Oct 24 '32	25
25,817.18			Oct 31 In	36.02	Oct 31 In	25
25,853.20			Nov 25 '32	8,656.25	Nov 25 '32	34
34,509.45	Nov 30 In		Nov 30 In	22.08	Nov 30 In	34
34,531.53			Nov 30 '32	22.08	Nov 30 '32	34
34,553.61			Dec 30 In	56.55	Dec 30 In	34
34,610.16	Jan 1 '33	34,005.19—			Jan 1 '33	
604.97			Jan 30 In	15.90	Jan 30 In	
620.87			Feb 28 In	1.01	Feb 28 In	
621.88	May 4 '33	621.88—			May 4 '33	

Plaintiff's Exhibit 11.

Date of withdrawal	Number of days prior to 12-16-33	Amount of daily withdrawals	Amount on which interest is to be calculated @ 6% for 1 day	Interest	60% of daily withdrawals	Days from 12-16-33 to 11-3-37	Amount on daily basis	Interest	50% of daily withdrawals	Days from 11-3-37 to 12-31-37	Amount on daily basis	Interest	Days from 12-31-37 to date of trial	Amount on daily basis	Interest
TREASURER OF THE CITY OF YONKERS															
3- 8-33	283	16.00	4,528.00	.74	9.60	1,417	13,603.20	2.24	8.00	58	464.00	.08	3	24.00	0
3- 9-33	282	57.26	16,147.32	2.65	34.36	1,417	48,688.12	8.01	28.63	58	1,660.54	.27	3	85.89	.01
3-10-33	281	14,04 .78	3,946,583.18	648.75	8,426.87	1,417	11,940,874.79	1,962.88	7,022.39	58	407,298.62	66.95	3	21,067.17	3.46
3-11-33	280	9,631.48	2,696,814.40	443.31	5,778.89	1,417	8,188,687.13	1,346.09	4,815.74	58	279,312.92	45.91	3	14,447.22	2.37
3-13-33	278	908.31	252,510.18	41.51	544.99	1,417	772,250.83	126.95	454.15	58	26,340.70	4.33	3	1,362.45	.22
3-14-33	277	413.21	114,459.17	18.82	247.93	1,417	351,316.81	57.75	206.60	58	11,982.80	1.97	3	619.80	.10
3-15-33	276	26,980.23	7,446,543.48	1,224.09	16,188.14	1,417	22,938,594.38	3,770.73	13,490.11	58	782,426.38	128.62	3	40,470.33	6.65
3-16-33	275	7,558.51	2,078,590.25	341.69	4,535.11	1,417	6,426,250.87	1,056.37	3,779.25	58	219,196.50	36.03	3	11,337.75	1.86
3-17-33	274	19,027.43	5,213,515.82	857.02	11,416.46	1,417	16,177,123.82	2,659.25	9,513.71	58	551,795.18	90.71	3	28,541.13	4.69
3-18-33	273	10,588.85	2,890,756.05	475.19	6,353.31	1,417	9,002,640.27	1,479.89	5,294.42	58	307,076.36	50.48	3	15,883.26	2.61
3-20-33	271	8,954.73	2,426,731.83	398.91	5,372.84	1,417	7,613,314.28	1,251.50	4,477.36	58	259,686.88	42.69	3	13,432.08	2.21
3-23-33	268	36,036.43	9,657,763.24	1,587.58	21,621.86	1,417	30,638,175.62	5,036.41	18,018.21	58	1,045,056.18	171.79	3	54,054.63	8.89
3-24-33	267	911.45	243,357.15	40.00	546.87	1,417	774,914.79	127.38	455.72	58	26,431.76	4.34	3	1,367.16	.22
3-25-33	266	18,103.01	4,815,406.66	791.57	10,861.80	1,417	15,391,170.60	2,530.06	9,051.50	58	524,987.00	86.30	3	27,154.50	4.46
3-26-33	265	49.50	13,117.50	2.16	29.70	1,417	42,084.90	6.92	24.75	58	1,435.50	.24	3	74.25	.01
3-27-33	264	3,680.87	971,749.68	159.74	2,208.52	1,417	3,129,472.84	514.43	1,840.43	58	106,744.94	17.55	3	5,521.29	.91
3-28-33	263	723.07	190,167.41	31.26	433.84	1,417	614,751.28	101.06	361.53	58	20,968.74	3.45	3	1,084.59	.18
3-29-33	262	315.26	82,598.12	13.58	189.16	1,417	268,039.72	44.06	157.63	58	9,142.54	1.50	3	472.89	.08
3-30-33	261	563.82	147,157.02	24.19	338.29	1,417	479,356.03	78.80	281.91	58	16,350.78	2.69	3	845.73	.14
3-31-33	260	582.28	151,392.80	24.89	349.37	1,417	495,057.29	81.38	291.14	58	16,886.12	2.78	3	873.42	.14
4- 3-33	259	73,571.12	19,054,920.08	3,132.32	44,142.67	1,417	62,550,163.39	10,282.22	36,785.56	58	2,133,562.48	350.72	3	110,356.68	18.14
4- 4-33	257	2,377.34	610,976.38	100.43	1,426.40	1,417	2,021,208.80	332.25	1,188.67	58	68,942.86	11.33	3	3,566.01	.59
4- 5-33	256	9,345.75	2,392,512.00	393.29	5,607.45	1,417	7,945,756.65	1,306.15	4,672.87	58	271,026.46	44.55	3	14,018.61	2.30
4- 6-33	255	627.12	159,915.60	26.29	376.27	1,417	533,174.59	87.65	313.56	58	18,186.48	2.99	3	940.68	.15
4- 7-33	254	584.99	148,587.46	24.43	350.99	1,417	497,352.83	81.76	292.50	58	16,965.00	2.79	3	877.50	.14
4- 8-33	253	4,285.31	1,084,183.43	178.22	2,571.19	1,417	3,643,376.23	598.91	2,142.66	58	124,274.28	20.43	3	6,427.98	1.06
4-10-33	252	13,663.63	3,443,234.76	566.01	8,198.18	1,417	11,616,821.06	1,909.61	6,831.82	58	396,245.56	65.14	3	20,495.46	3.37
4-11-33	250	4,221.33	305,332.50	50.19	732.80	1,417	1,038,377.60	170.69	610.67	58	35,418.86	5.82	3	1,832.01	.30
4-12-33	249	578.04	143,931.96	23.66	346.82	1,417	491,443.94	80.79	289.02	58	16,763.16	2.76	3	867.06	.14
4-13-33	248	1,735.42	430,384.16	70.75	1,041.25	1,417	1,475,451.25	242.54	867.71	58	50,327.18	8.27	3	2,603.13	.43
4-14-33	246	102.90	25,194.00	4.14	61.20	1,417	86,720.40	14.26	51.00	58	2,958.00	.49	3	153.00	.03
4-15-33	245	141.60	34,833.60	5.73	84.96	1,417	120,388.32	19.79	70.80	58	4,106.40	.68	3	212.40	.03
4-17-33	243	98.03	24,017.35	3.95	58.82	1,417	83,347.94	13.70	49.02	58	2,843.16	.47	3	147.06	.02
4-18-33	242	32.25	7,901.25	1.30	19.35	1,417	27,418.95	4.51	16.13	58	935.54	.15	3	48.39	.01
4-19-33	241	168.89	40,871.38	6.72	101.33	1,417	143,584.61	23.60	84.45	58	4,898.10	.81	3	253.35	.04
4-20-33	240	123.58	29,782.78	4.90	74.15	1,417	105,070.55	17.27	61.79	58	3,583.82	.59	3	185.37	.03
4-21-33	239	4,432.50	1,063,800.00	174.87	2,659.50	1,417	3,768,511.50	619.48	2,216.25	58	128,542.50	21.13	3	6,648.75	1.09
4-22-33	238	223.04	53,306.56	8.76	133.82	1,417	189,622.94	31.17	111.52	58	6,468.16	1.06	3	334.56	.05
4-24-33	236	185.25	44,089.50	7.25	111.15	1,417	157,499.55	25.89	92.63	58	5,372.54	.88	3	277.89	.05
4-25-33	235	29.41	6,940.76	1.14	17.65	1,417	25,010.05	4.11	14.71	58	853.18	.14	3	44.13	.01
4-26-33	234	2.25	528.75	.09	1.35	1,417	1,912.95	.31	1.13	58	65.54	.01	3	3.39	0
		154.77	36,216.18	5.95	92.86	1,417	131,582.62	21.63	77.39	58	4,488.62	.74	3	232.17	.04

Plaintiff's Exhibit 11.

60% of daily withdrawals	Days from 12-15-33 to 11-3-37	Amount on daily basis	Interest	50% of daily withdrawals	Days from 11-3-37 to 12-31-37	Amount on daily basis	Interest	Days from 12-31-37 to date of trial	Amount on daily basis	Interest	Aggregate amount of interest due
9.60	1,417	13,603.20	2.24	8.00	58	464.00	.08	3	24.00	0	3.06
34.36	1,417	48,688.12	8.01	28.63	58	1,660.54	.27	3	85.89	.01	10.94
8,426.87	1,417	11,940,874.79	1,962.88	7,022.39	58	407,298.62	66.95	3	21,067.17	3.46	2,682.04
5,778.89	1,417	8,188,687.13	1,346.09	4,815.74	58	279,312.92	45.91	3	14,447.22	2.37	1,837.68
544.99	1,417	772,250.83	126.95	454.15	58	26,340.70	4.33	3	1,362.45	.22	173.01
247.93	1,417	351,316.81	57.75	206.60	58	11,982.80	1.97	3	619.80	.10	78.64
16,188.14	1,417	22,938,594.38	3,770.73	13,490.11	58	782,426.38	128.62	3	40,470.33	6.65	5,130.09
4,535.11	1,417	6,426,250.87	1,056.37	3,779.25	58	219,196.50	36.03	3	11,337.75	1.86	1,435.95
11,416.46	1,417	16,177,123.82	2,659.25	9,513.71	58	551,795.18	90.71	3	28,541.13	4.69	3,611.67
6,353.31	1,417	9,002,640.27	1,479.89	5,294.42	58	307,076.36	50.48	3	15,883.26	2.61	2,008.17
5,372.84	1,417	7,613,314.28	1,251.50	4,477.36	58	259,686.88	42.69	3	13,432.08	2.21	1,695.31
21,621.86	1,417	30,638,175.62	5,036.41	18,018.21	58	1,045,056.18	171.79	3	54,054.63	8.89	6,804.67
546.87	1,417	774,914.79	127.38	455.72	58	26,431.76	4.34	3	1,367.16	.22	171.94
10,861.80	1,417	15,391,170.60	2,530.06	9,051.50	58	524,987.00	86.30	3	27,154.50	4.46	3,412.39
29.70	1,417	42,084.90	6.92	24.75	58	1,435.50	.24	3	74.25	.01	9.33
2,208.52	1,417	3,129,472.84	514.43	1,840.43	58	106,744.94	17.55	3	5,521.29	.91	692.63
433.84	1,417	614,751.28	101.06	361.53	58	20,968.74	3.45	3	1,084.59	.18	135.95
189.16	1,417	268,039.72	44.06	157.63	58	9,142.54	1.50	3	472.89	.08	52.22
338.29	1,417	479,356.93	78.80	281.91	58	16,350.78	2.69	3	845.73	.14	105.22
349.37	1,417	495,057.29	81.38	291.14	58	16,886.12	2.78	3	873.42	.14	109.19
44,142.67	1,417	62,550,163.39	10,282.22	36,785.56	58	2,133,562.48	350.72	3	110,356.68	18.14	13,783.40
1,426.40	1,417	2,021,208.80	332.25	1,188.67	58	68,942.86	11.33	3	3,566.01	.59	444.60
5,607.45	1,417	7,945,756.65	1,306.15	4,672.87	58	271,026.46	44.55	3	14,018.61	2.30	1,746.29
376.27	1,417	533,174.59	87.65	313.56	58	18,186.48	2.99	3	940.68	.15	117.08
350.99	1,417	497,352.83	81.76	292.50	58	16,965.00	2.79	3	877.50	.14	109.12
3,571.19	1,417	3,643,376.23	598.91	2,142.66	58	124,274.28	20.43	3	6,427.98	1.06	798.62
8,198.18	1,417	11,616,821.06	1,909.61	6,831.82	58	396,245.56	65.14	3	20,495.46	3.37	2,544.13
732.80	1,417	1,038,377.60	170.69	610.67	58	35,418.86	5.82	3	1,832.01	.30	227.00
346.82	1,417	491,443.94	80.79	289.02	58	16,763.16	2.76	3	867.06	.14	107.35
1,041.25	1,417	1,475,451.25	242.54	867.71	58	50,327.18	8.27	3	2,603.13	.43	321.99
61.20	1,417	86,720.40	14.26	51.00	58	2,958.00	.49	3	153.00	.03	18.92
84.96	1,417	120,388.32	19.79	70.80	58	4,106.40	.68	3	212.40	.03	26.23
58.82	1,417	83,347.94	13.70	49.02	58	2,843.16	.47	3	147.06	.02	18.14
19.35	1,417	27,418.95	4.51	16.13	58	935.54	.15	3	48.39	.01	5.97
101.33	1,417	143,584.61	23.60	84.45	58	4,898.10	.81	3	253.35	.04	31.17
74.15	1,417	105,070.55	17.27	61.79	58	3,583.82	.59	3	185.37	.03	22.79
2,659.50	1,417	3,768,511.50	619.48	2,216.25	58	128,542.50	21.13	3	6,648.75	1.09	816.57
133.82	1,417	189,622.94	31.17	111.52	58	6,468.16	1.06	3	334.56	.05	41.04
111.15	1,417	157,499.55	25.89	92.63	58	5,372.54	.88	3	277.89	.05	34.07
17.65	1,417	25,010.05	4.11	14.71	58	853.18	.14	3	44.13	.01	5.40
1.35	1,417	1,912.95	.31	1.13	58	65.54	.01	3	3.39	0	.41
92.86	1,417	131,582.62	21.63	77.39	58	4,488.62	.74	3	232.17	.04	28.36

Plaintiff's Exhibit 11.

Date of withdrawal	Number of days prior to 12-16-33	Amount of daily withdrawals	Amount on which interest is to be calculated @ 6% for 1 day	Interest	50% of daily withdrawals	Days from 12-16-33 to 11-3-37	Amount on daily basis	Interest	50% of daily withdrawals	Days from 11-3-37 to 12-31-37	Amount on daily basis	Interest	Days from 12-31-37 to date of trial	Amount on daily basis	Interest
4-27-33	233	257.29	59,948.57	9.85	154.37	1,417	218,742.29	35.96	128.65	58	7,461.70	1.23	3	385.95	.06
4-28-33	232	16.50	3,828.00	.63	9.90	1,417	14,028.30	2.31	8.25	58	478.50	.08	3	24.75	0
4-29-33	231	41.67	9,625.77	1.58	25.00	1,417	35,425.00	5.82	20.84	58	1,208.72	.20	3	62.52	.01
5- 2-33	228	34.41	7,845.48	1.29	20.65	1,417	29,261.05	4.81	17.20	58	997.60	.16	3	51.60	.01
5- 3-33	227	1.25	283.75	.05	.75	1,417	1,062.75	.17	.63	58	36.54	.01	3	1.89	0
5- 4-33	226	6.25	1,412.50	.23	3.75	1,417	5,313.75	.87	3.12	58	180.96	.03	3	9.36	0
5- 5-33	225	22.73	5,114.25	.84	13.64	1,417	19,327.88	3.18	11.37	58	659.46	.11	3	34.11	.01
5- 6-33	224	34.39	7,680.96	1.26	20.63	1,417	29,232.71	4.81	17.19	58	997.02	.16	3	51.57	.01
5- 8-33	222	73.91	16,408.02	2.70	44.35	1,417	62,833.95	10.33	36.96	58	2,143.68	.35	3	110.88	.02
5- 9-33	221	15.30	3,381.30	.56	9.18	1,417	13,008.06	2.14	7.65	58	443.70	.07	3	22.95	0
5-10-33	220	36.75	8,085.00	1.33	22.05	1,417	31,244.85	5.14	18.37	58	1,065.46	.18	3	55.11	.01
5-11-33	219	29.41	6,440.79	1.06	17.65	1,417	25,010.05	4.11	14.71	58	853.18	.14	3	44.13	.01
5-15-33	215	47.25	10,158.75	1.67	28.35	1,417	40,171.95	6.60	23.62	58	1,369.96	.23	3	70.86	.01
5-17-33	213	30.61	6,519.93	1.07	18.37	1,417	26,030.29	4.28	15.31	58	887.98	.15	3	45.93	.01
5-20-33	210	27.22	5,716.20	.94	16.33	1,417	23,139.61	3.80	13.61	58	789.38	.13	3	40.83	.01
5-23-33	207	9.65	1,997.55	.33	5.79	1,417	8,204.43	1.35	4.82	58	279.56	.05	3	14.46	0
5-24-33	206	80.70	16,624.20	2.73	48.42	1,417	68,611.14	11.28	40.35	58	2,340.30	.38	3	121.05	.02
6- 9-33	190	37.50	7,125.00	1.17	22.50	1,417	31,882.50	5.24	18.75	58	1,087.50	.18	3	56.25	.01
6-10-33	189	145.13	27,429.57	4.51	87.08	1,417	123,392.36	20.28	72.57	58	4,209.06	.69	3	217.71	.04
6-14-33	185	25.00	4,625.00	.76	15.00	1,417	21,255.00	3.49	12.50	58	725.00	.12	3	37.50	.01
6-28-33	171	27.90	4,770.90	.78	16.74	1,417	23,720.58	3.90	13.95	58	809.10	.13	3	41.85	.01
6-30-33	169	122.60	20,618.00	3.39	73.20	1,417	103,724.40	17.05	61.00	58	3,538.00	.58	3	183.00	.03
7- 1-33	168	267.00	44,856.00	7.37	160.20	1,417	227,003.40	37.32	133.50	58	7,743.00	1.27	3	400.50	.07
7- 3-33	166	132.00	21,912.00	3.60	79.20	1,417	112,226.40	18.45	66.00	58	3,828.00	.63	3	198.00	.03
7- 5-33	164	128.34	21,047.76	3.46	77.00	1,417	109,109.00	17.94	64.17	58	3,721.86	.61	3	192.51	.03
7- 6-33	163	98.50	16,055.50	2.64	59.10	1,417	83,744.70	13.77	49.25	58	2,856.50	.47	3	147.75	.02
7- 7-33	162	40.00	6,480.00	1.07	24.00	1,417	34,008.00	5.59	20.00	58	1,160.00	.19	3	60.00	.01
7- 8-33	161	95.00	15,295.00	2.51	57.00	1,417	80,769.00	13.28	47.50	58	2,755.00	.45	3	142.50	.02
7-10-33	159	55.00	8,745.00	1.44	33.00	1,417	46,761.00	7.69	27.50	58	1,595.00	.26	3	82.50	.01
7-13-33	156	15.00	2,340.00	.38	9.00	1,417	12,753.00	2.10	7.50	58	435.00	.07	3	22.50	0
7-17-33	152	20.00	3,040.00	.50	12.00	1,417	17,004.00	2.80	10.00	58	580.00	.10	3	30.00	0
7-22-33	147	20.00	2,940.00	.48	12.00	1,417	17,004.00	2.80	10.00	58	580.00	.10	3	30.00	0
7-24-33	145	2.19	317.55	.05	1.31	1,417	1,856.27	.31	1.09	58	63.22	.01	3	3.27	0
7-26-33	143	25.00	3,575.00	.59	15.00	1,417	21,255.00	3.49	12.50	58	725.00	.12	3	37.50	.01
7-27-33	142	14.70	2,087.40	.34	8.82	1,417	12,497.94	2.05	7.35	58	426.30	.07	3	22.05	0
7-28-33	141	18.34	2,585.94	.43	11.00	1,417	15,587.00	2.56	9.17	58	531.86	.09	3	27.51	0
8-10-33	128	9.00	1,152.00	.19	5.40	1,417	7,651.80	1.26	4.50	58	261.00	.04	3	13.50	0
9- 5-33	102	24.00	2,448.00	.40	14.40	1,417	20,404.80	3.35	12.00	58	696.00	.11	3	36.00	.01
9- 6-33	101	2.35	237.35	.04	1.41	1,417	1,997.97	.33	1.18	58	68.44	.01	3	3.54	0
12-22-33	0	27.00			16.20	1,411	22,858.20	3.76	13.50	58	783.00	.13	3	40.50	.01
1-16-34	0	28.50			17.10	1,386	23,700.60	3.90	14.25	58	826.50	.14	3	42.75	.01
1-23-34	0	4.20			2.52	1,379	3,475.08	.57	2.10	58	121.80	.02	3	6.30	0
		274,979.04	72,892,097.69	11,982.26	164,987.43		233,786,165.25	38,430.69	137,489.52		7,974,392.16	1,310.88		412,468.56	67.75

Plaintiff's Exhibit 11.

60% of daily withdrawals	Days from 12-16-33 to 11-3-37	Amount on daily basis	Interest	50% of daily withdrawals	Days from 11-3-37 to 12-31-37	Amount on daily basis	Interest	Days from 12-31-37 to date of trial	Amount on daily basis	Interest	Aggregate amount of interest due
154.37	1,417	218,742.29	35.96	128.65	58	7,461.70	1.23	3	385.95	.06	47.10
9.90	1,417	14,028.30	2.31	8.25	58	478.50	.08	3	24.75	0	3.02
25.00	1,417	35,425.00	5.82	20.84	58	1,208.72	.20	3	62.52	.01	7.61
20.65	1,417	29,261.05	4.81	17.20	58	997.60	.16	3	51.60	.01	6.27
.75	1,417	1,062.75	.17	.63	58	36.54	.01	3	1.89	0	.23
3.75	1,417	5,313.75	.87	3.12	58	180.96	.03	3	9.36	0	1.13
13.64	1,417	19,327.88	3.18	11.37	58	659.46	.11	3	34.11	.01	4.14
20.63	1,417	29,232.71	4.81	17.19	58	997.02	.16	3	51.57	.01	6.24
44.35	1,417	62,843.95	10.33	36.96	58	2,143.68	.35	3	110.88	.02	13.40
9.18	1,417	13,008.06	2.14	7.65	58	443.70	.07	3	22.95	0	2.77
22.05	1,417	31,244.85	5.14	18.37	58	1,065.46	.18	3	55.11	.01	6.66
17.65	1,417	25,010.05	4.11	14.71	58	853.18	.14	3	44.13	.01	5.32
28.35	1,417	40,171.95	6.60	23.62	58	1,369.96	.23	3	70.86	.01	8.51
18.37	1,417	26,030.29	4.28	15.31	58	887.98	.15	3	45.93	.01	5.51
16.33	1,417	23,139.61	3.80	13.61	58	789.38	.13	3	40.83	.01	4.88
5.79	1,417	8,204.43	1.35	4.82	58	279.56	.05	3	14.46	0	1.73
48.42	1,417	68,611.14	11.28	40.35	58	2,340.30	.38	3	121.05	.02	14.41
22.50	1,417	31,882.50	5.24	18.75	58	1,087.50	.18	3	56.25	.01	6.60
87.08	1,417	123,392.36	20.28	72.57	58	4,209.06	.69	3	217.71	.04	25.52
15.00	1,417	21,255.00	3.49	12.50	58	725.00	.12	3	37.50	.01	4.38
16.74	1,417	23,720.58	3.90	13.95	58	809.10	.13	3	41.85	.01	4.82
73.20	1,417	103,724.40	17.05	61.00	58	3,538.00	.58	3	183.00	.03	21.05
160.20	1,417	227,003.40	37.32	133.50	58	7,743.00	1.27	3	400.50	.07	46.03
79.20	1,417	112,226.40	18.45	66.00	58	3,828.00	.63	3	198.00	.03	22.71
77.00	1,417	109,109.00	17.94	64.17	58	3,721.86	.61	3	192.51	.03	22.04
59.10	1,417	83,744.70	13.77	49.25	58	2,856.50	.47	3	147.75	.02	16.90
24.00	1,417	34,008.00	5.59	20.00	58	1,160.00	.19	3	60.00	.01	6.86
57.00	1,417	80,769.00	13.28	47.50	58	2,755.00	.45	3	142.50	.02	16.26
33.00	1,417	46,761.00	7.69	27.50	58	1,595.00	.26	3	82.50	.01	9.40
9.00	1,417	12,753.00	2.10	7.50	58	435.00	.07	3	22.50	0	2.55
12.00	1,417	17,004.00	2.80	10.00	58	580.00	.10	3	30.00	0	3.40
12.00	1,417	17,004.00	2.80	10.00	58	580.00	.10	3	30.00	0	3.38
1.31	1,417	1,856.27	.31	1.09	58	63.22	.01	3	3.27	0	.37
15.00	1,417	21,255.00	3.49	12.50	58	725.00	.12	3	37.50	.01	4.21
8.82	1,417	12,497.94	2.05	7.35	58	426.30	.07	3	22.05	0	2.46
11.00	1,417	15,587.00	2.56	9.17	58	531.86	.09	3	27.51	0	3.08
5.40	1,417	7,651.80	1.26	4.50	58	261.00	.04	3	13.50	0	1.49
14.40	1,417	20,404.80	3.35	12.00	58	696.00	.11	3	36.00	.01	3.87
1.41	1,417	1,997.97	.33	1.18	58	68.44	.01	3	3.54	0	.38
16.20	1,411	22,853.20	3.76	13.50	58	783.00	.13	3	40.50	.01	3.90
17.10	1,386	23,700.60	3.90	14.25	58	826.50	.14	3	42.75	.01	4.05
2.52	1,379	3,475.08	.57	2.10	58	121.80	.02	3	6.30	0	.59
164,987.43		233,786,465.25	38,430.69	137,489.52		7,974,392.16	1,310.88		412,468.56	67.75	51,791.58

Plaintiff's Exhibit 12.

Date of withdrawal	Number of days prior to 12-16-33	Amount of daily withdrawals	Amount on which interest is to be calculated @ 6% for 1 day	Interest	60% of daily withdrawals	Days from 12-16-33 to 11-3-37	Amount on daily basis	Interest	50% of daily withdrawals	Days from 11-3-37 to 12-31-37	Amount on daily basis	Interest	Days from 12-31-37 to date of trial	Amount on daily basis	Interest
CITY OF YONKERS															
5-23-33	207	48.00	9,936.00	1.63	28.80	1,417	40,809.60	6.71	24.00	58	1,392.00	.23	3	72.00	.01
7- 7-33	162	253.70	41,099.40	6.76	152.22	1,417	215,695.74	35.46	126.85	58	7,357.30	1.21	3	380.55	.06
7- 8-33	161	472.00	75,992.00	12.49	283.20	1,417	401,294.40	65.97	236.00	58	13,688.00	2.25	3	708.00	.12
7-10-33	159	172.00	27,348.00	4.50	103.20	1,417	146,234.40	24.04	86.00	58	4,988.00	.82	3	258.00	.04
7-11-33	158	160.34	25,333.72	4.16	96.20	1,417	136,315.40	22.41	80.17	58	4,649.86	.76	3	240.51	.04
7-12-33	157	164.00	25,748.00	4.23	98.40	1,417	139,432.80	22.92	82.00	58	4,756.00	.78	3	246.00	.04
7-13-33	156	122.80	19,156.80	3.15	73.68	1,417	104,404.56	17.16	61.40	58	3,561.20	.59	3	184.20	.03
7-14-33	155	60.00	9,300.00	1.53	36.00	1,417	51,012.00	8.39	30.00	58	1,740.00	.29	3	90.00	.01
7-18-33	151	25.00	3,775.00	.62	15.00	1,417	21,255.00	3.49	12.50	58	725.00	.12	3	37.50	.01
7-21-33	148	25.00	3,700.00	.61	15.00	1,417	21,255.00	3.49	12.50	58	725.00	.12	3	37.50	.01
		1,502.84	241,388.92	39.68	901.70	1,417	1,277,708.90	210.04	751.42	58	43,582.36	7.17	3	2,254.26	.37

Plaintiff's Exhibit 12.

60% of daily withdrawals	Days from 12-16-33 to 11-3-37	Amount on daily basis	Interest	50% of daily withdrawals	Days from 11-3-37 to 12-31-37	Amount on daily basis	Interest	Days from 12-31-37 to date of trial	Amount on daily basis	Interest	Aggregate amount of interest due
28.80	1,417	40,809.60	6.71	24.00	58	1,392.00	.23	3	72.00	.01	8.58
152.22	1,417	215,695.74	35.46	126.85	58	7,357.30	1.21	3	380.55	.06	43.49
283.20	1,417	401,294.40	65.97	236.00	58	13,688.00	2.25	3	708.00	.12	80.83
103.20	1,417	146,234.40	24.04	86.00	58	4,988.00	.82	3	258.00	.04	29.40
96.20	1,417	136,315.40	22.41	80.17	58	4,649.86	.76	3	240.51	.04	27.37
98.40	1,417	139,432.80	22.92	82.00	58	4,756.00	.78	3	246.00	.04	27.97
73.68	1,417	104,404.56	17.16	61.40	58	3,561.20	.59	3	184.20	.03	20.93
36.00	1,417	51,012.00	8.39	30.00	58	1,740.00	.29	3	90.00	.01	10.22
15.00	1,417	21,255.00	3.49	12.50	58	725.00	.12	3	37.50	.01	4.24
15.00	1,417	21,255.00	3.49	12.50	58	725.00	.12	3	37.50	.01	4.23
901.70	1,417	1,277,798.90	210.04	751.42	58	43,582.36	7.17	3	2,254.26	.37	257.26

Plaintiff's Exhib' 13.

IN ACCOUNT WITH

THE FIRST NATIONAL BANK

AND

TRUST COMPANY OF YONKERS

Yonkers, N. Y.

Treasurer of the City of Yonkers.

Transcript from Feb. 28th to March 15th, 1933

Date	Checks in Detail			Date	Deposits	Date	New Balance
	Balance Brought Forward						
						Feb 28 '33	323,811.78*—
Mar 1 '33	1,941.90—	21,956.92—	617.11—				
Mar 1 '33	1,002.37—					Mar 1 '33	298,293.48*—
Mar 2 '33	4,115.36—	762.80—	72.56—			Mar 2 '33	293,342.76*—
Mar 3 '33	7,272.39—	4,679.50—	845.63—				
Mar 3 '33	4,737.28—	702.43—				Mar 3 '33	275,105.53*—
Mar 8 '33	16.00—	57.26—				Mar 8 '33	275,032.27*—
Mar 10 '33	6,105.92—	7,938.86—				Mar 10 '33	260,987.49*—
Mar 11 '33	8,579.36—	1,052.18—				Mar 11 '33	251,356.01*—
Mar 13 '33	908.31—					Mar 13 '33	250,447.70*—
Mar 14 '33	413.21—					Mar 14 '33	250,034.49*—
Mar 15 '33	25,964.66—	1,015.57—				Mar 15 '33	223,054.26*—

Balance certified to be correct

JAS. D. M. CALLUM
Asst. Cashie

Mar 16 '33	7,336.56—						
Mar 16 '33	221.95—					Mar 16 '33	215,495.75*—
Mar 17 '33	19,028.43—					Mar 17 '33	196,468.32*—
Mar 18 '33	8,566.78—						
Mar 18 '33	1,393.52—					Mar 18 '33	186,508.02*—
Mar 20 '33	628.55—						
Mar 20 '33	5,690.18—						
Mar 20 '33	51.28—						
Mar 20 '33	125.53—						
Mar 20 '33	3,177.74—					Mar 20 '33	176,924.74*—
Mar 24 '33	26,900.63—					Mar 24 '33	150,024.11*—
Mar 25 '33	2,133.98—						
Mar 25 '33	26,065.78—					Mar 25 '33	121,824.35*—
Mar 27 '33	3,680.87—					Mar 27 '33	118,143.48*—
Mar 28 '33	723.07—					Mar 28 '33	117,420.41*—
Mar 29 '33	315.26—					Mar 29 '33	117,105.15*—
Mar 30 '33	563.82—					Mar 30 '33	116,541.33*—
Mar 31 '33	582.28—					Mar 31 '33	115,959.05*—

Balance Feb 28 '33	323,811.78*—
Cks. P't'd.	207,852.73 —
Balance	115,959.05*—

Plaintiff's Exhibit 13.

IN ACCOUNT WITH

THE FIRST NATIONAL BANK

AND

TRUST COMPANY OF YONKERS

Yonkers, N. Y.

Treasurer of the City of Yonkers

Date	Checks in Detail	Date	Deposits	Date	New Balance
	Balance Brought Forward				115,959.05
Apr 1 '33	19,763.97—			Apr 1 '33	96,195.68*—
Apr 1 '33	1,132.12—			Apr 1 '33	95,062.96*—
Apr 1 '33	11,707.91—			Apr 1 '33	83,355.05*—
Apr 1 '33	40,967.12—			Apr 1 '33	42,387.93*—
Apr 3 '33	2,377.34—			Apr 3 '33	40,010.59*
Apr 4 '33	9,345.75—				30,664.84*—
Apr 5 '33	627.12—			Apr 5 '33	30,037.72*
Apr 6 '33	584.99—			Apr 6 '33	29,452.73*—
Apr 7 '33	3,150.25—			Apr 7 '33	26,302.48*
Apr 7 '33	1,135.06—			Apr 7 '33	25,167.42*
Apr 8 '33	13,663.63—			Apr 8 '33	11,503.79*
Apr 10 '33	1,221.33—			Apr 10 '33	10,282.46*
Apr 11 '33	1,578.04—			Apr 11 '33	9,704.42*
Apr 12 '33	775.42—			Apr 12 '33	7,969.00*
Apr 13 '33	102.00—			Apr 13 '33	7,867.00*
14 '33	141.60—			14 '33	7,725.40*
Apr 15 '33	98.03—			Apr 15 '33	7,627.37*
		Apr 17 '33		Apr 17 '33	7,627.37*
Apr 17 '33	32.25—			Apr 17 '33	7,595.12*
Apr 18 '33	168.89—			Apr 18 '33	7,426.23*—
Apr 19 '33	123.58—			Apr 19 '33	7,302.65*—
Apr 20 '33	4,432.50—	Apr 20 '33		Apr 20 '33	2,870.15*
Apr 21 '33	223.04—			Apr 21 '33	2,647.11*
Apr 22 '33	185.25—			Apr 22 '33	2,461.86*—
Apr 24 '33	29.41—			Apr 24 '33	2,432.45*—
Apr 25 '33	2.25—			Apr 25 '33	2,430.20*—
Apr 26 '33	154.77—			Apr 26 '33	2,275.43*—
Apr 27 '33	257.29—			Apr 27 '33	2,018.14*—
Apr 28 '33	16.50—			Apr 28 '33	2,001.64*—
Apr 29 '33	41.67—			Apr 29 '33	1,959.97*—
				Balance	0*
				Mar 31 '33	115,959.05*
				Cks. Ret.	113,999.08#
				Balance	1,959.97*

Plaintiff's Exhibit 13.

IN ACCOUNT WITH

THE FIRST NATIONAL BANK

AND

TRUST COMPANY OF YONKERS

Yonkers, N. Y.

Treasurer of the City of Yonkers

Date	Checks in Detail	Date	Deposits	Date	New Balance
	Balance Brought Forward				
May 2 '33	34.41—			May 2 '33	1,959.97*
May 3 '33	1.25—			May 2 '33	1,925.56*—
May 4 '33	6.25—			May 3 '33	1,924.31*—
May 5 '33	22.73—			May 4 '33	1,918.06*—
May 6 '33	34.39—			May 5 '33	1,895.33*—
May 8 '33	73.91—			May 6 '33	1,860.94*—
May 9 '33	15.30—			May 8 '33	1,787.03*—
May 10 '33	36.75—			May 9 '33	1,771.73*—
May 11 '33	29.41—			May 10 '33	1,734.98*—
May 15 '33	47.25—			May 11 '33	1,705.57*—
				May 15 '33	1,658.32*—
May 17 '33	30.61—			May 17 '33	1,658.32*
May 20 '33	27.22—			May 17 '33	1,627.71*—
May 23 '33	9.65—			May 20 '33	1,600.49*—
May 24 '33	80.70—			May 23 '33	1,590.84*—
				May 24 '33	1,510.14*—
				Balance	
				Apr 30 '33	1,959.97
				Cks. Ret.	449.83‡
				Balance	1,510.14*
					1,510.14*
Jun 9 '33	37.50—			Jun 9 '33	1,472.64*—
Jun 10 '33	145.13—			Jun 10 '33	1,327.51*—
Jun 14 '33	25.00—			Jun 14 '33	1,302.51*—
Jun 28 '33	27.90—			Jun 28 '33	1,274.61*—
Jun 30 '33	122.00—			Jun 30 '33	1,152.61*—
				Balance	
				May 31 '33	1,510.14
				Cks.	357.53‡
				Balance	1,152.61*
Jul 1 '33	267.00—			Jul 1 '33	1,152.61*
Jul 3 '33	132.00—			Jul 1 '33	885.61*—
Jul 5 '33	128.34—			Jul 3 '33	753.61*—
Jul 6 '33	98.50—			Jul 5 '33	625.27*—
Jul 7 '33	40.00—			Jul 6 '33	526.77*—
Jul 8 '33	95.00—			Jul 7 '33	486.77*—
Jul 10 '33	55.00—			Jul 8 '33	391.77*—
Jul 13 '33	15.00—			Jul 10 '33	336.77*—
Jul 17 '33	20.00—			Jul 13 '33	321.77*—
Jul 22 '33	20.00—			Jul 17 '33	301.77*—
Jul 24 '33	2.19—			Jul 22 '33	281.77*—
Jul 26 '33	25.00—			Jul 24 '33	279.58*—
Jul 27 '33	14.70—			Jul 26 '33	254.58*—
Jul 28 '33	18.34—			Jul 27 '33	239.88*—
				Jul 28 '33	221.54*—
				Balance	
				Jun 30 '33	1,152.61
				Chks. Ret	931.07‡
				Balance	221.54*

Plaintiff's Exhibit 13.

IN ACCOUNT WITH

THE FIRST NATIONAL BANK

AND

TRUST COMPANY OF YONKERS

Yonkers, N. Y.

Treasurer of the City of Yonkers

Date	Checks in Detail	Date	Deposits	Date	New Balance
	Balance Brought Forward			Jul 31 '33	221.54*—
				Aug 10 '33	212.54*—
Aug 10 '33	9.00—			Balance	
				Jul 31 '33	221.54
				Cks. Rtd.	9.00#
				Balance	212.54*

IN ACCOUNT WITH

THE FIRST NATIONAL BANK

AND

TRUST COMPANY OF YONKERS

Yonkers, N. Y.

City of Yonkers

Date	Checks in Detail	Date	Deposits	Date	New Balance
	Balance Brought Forward				
				Feb 28 '33	1,502.84

Plaintiff's Exhibit 13.

IN ACCOUNT WITH

THE FIRST NATIONAL BANK

AND

TRUST COMPANY OF YONKERS

Yonkers, N. Y.

City of Yonkers

Checks in Detail	Date	Deposits	Date	New Balance
Balance Brought Forward ☞				
	Apr 20 '33		Apr 20 '33	1,502.84*

IN ACCOUNT WITH

THE FIRST NATIONAL BANK

AND

TRUST COMPANY OF YONKERS

Yonkers, N. Y.

City of Yonkers

Checks in Detail		Date	Deposits	Date	New Balance
Balance Brought Forward ☞					
				May 5 '33	1,502.84*
3	5.50— 42.50—			May 23 '33	1,454.84*
				Balance	
				Apr 30 '33	1,502.84
				Cks. Ret.	48.00#
				Balance	1,454.84*

Plaintiff's Exhibit 13.

IN ACCOUNT WITH

THE FIRST NATIONAL BANK

AND

TRUST COMPANY OF YONKERS

Yonkers, N. Y.

City of Yonkers

ate	Checks in Detail	Date	Deposits	Date	New Balance
	Balance Brought Forward ☞				
				May 31, 1933	1,454.84*

IN ACCOUNT WITH

THE FIRST NATIONAL BANK

AND

TRUST COMPANY OF YONKERS

Yonkers, N. Y.

City of Yonkers

ate	Checks in Detail	Date	Deposits	Date	New Balance
	Balance Brought Forward ☞				
				Jul 1 '33	1,454.84*—
7 '33	253.70—			Jul 7 '33	1,201.14*—
8 '33	472.00—			Jul 8 '33	729.14*—
10 '33	172.00—			Jul 10 '33	557.14*—
11 '33	160.34—			Jul 11 '33	396.80*—
12 '33	164.00—			Jul 12 '33	232.80*—
13 '33	122.80—			Jul 13 '33	110.00*—
14 '33	60.00—			Jul 14 '33	50.00*—
18 '33	25.00—			Jul 18 '33	25.00*—
21 '33	25.00—			Jul 21 '33	.00*—
				Balance	*
				Jun 30 '33	1,454.84
				Cks. Ret.	1,454.84#
				Balance	.00*

454

Defendant's Exhibit A.

Identification only.

Defendant's Exhibit B.

Identification only.

455

Defendant's Exhibit C.

Description of Assets Pledged	Face Value
State of Arkansas, 4½s, due 1942	$ 50,000.00
Butte, Montana, 6s, due 1941	15,000.00
Charlotte, North Carolina, 4½s, due 1934	5,000.00
Galveston, Texas, 5s, due 1933-1935	12,000.00
Town of Greenburgh, New York, 4½s, due 1946	15,000.00
Town of Greenburgh, New York, 4½s, due 1953	5,000.00
Town of Greenburgh, New York, 4½s, due 1954	1,000.00
Town of Huntington, Long Island, 4½s, due 1938	2,000.00
Town of Huntington, Long Island, 4½s, due 1945	2,000.00
Town of Huntington, Long Island, 4½s, due 1946	7,000.00
County of Jefferson, Alabama, 5s, due 1947	15,000.00
State of Louisiana, 4¾s, 1973	10,000.00
State of Louisiana, 4½s, due 1953	5,000.00
New Orleans, 4½s, due 1956	5,000.00
City of New York, 4½s, due 1965	10,000.00

Defendant's Exhibit C.

457

Description of Assets Pledged	Face Value
Norfolk, Virginia, 4½s, due 1935	$ 10,000.00
Norfolk, Virginia, 4½s, due 1935	15,000.00
State of Oregon, 5½s, due 1937	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1946	2,500.00
City of Orlando, Florida, 5½s, due 1952	25,000.00
Portsmouth, Virginia, 5s, due 1954	10,000.00
City and County of San Francisco, 5s, due 1945	10,000.00
Village of Sea Cliff, New York, 5s, due 1933	1,000.00
State of South Dakota, 5s, due 1938	15,000.00
Winston-Salem, North Carolina, 4¾s, due 1936	14,000.00
Canadian, Int. Paper, 6s, due 1949	25,000.00
Comm. of Kentucky, 4½s, due 1950	50,000.00
Town of Lyndhurst, 5½s, due 1934	55,000.00
State of New Mexico, 6s, due 1935	25,000.00
Bay City, 4s, due 1935	3,000.00
Seattle, Washington, 5s, due 1934	6,000.00
Seattle, Washington, 5s, due 1940	2,000.00
Teaneck, New Jersey, 4½s, due 1934	25,000.00
Union, 6s, due 1934	25,000.00
Ohio Public Service, 6s, due 1953	30,000.00
South Bay Cons. Water Co., 5s, due 1950	10,000.00
Laclede Gas Light Co., 5½s, due 1935	5,000.00
Total Face Value	$535,000.00

458

459

460

Defendant's Exhibit D.

Resolution of Board of Estimate and Apportionment of The City of Yonkers, Adopted July 10, 1929.

By Mr. Davis:

Resolved, That The First National Bank, Yonkers National Bank and Trust Company, Yonkers Trust Company, Westchester Trust Company, the Bryn-Mawr-Nepperhan National Bank and the Central National Bank be designated as banks and trust companies for the purpose
461 of depositing all moneys of the city received by the City Treasurer of the City of Yonkers; and the City Treasurer is hereby directed to continue to procure adequate security for all moneys deposited by him in any or all of the depositories hereinbefore designated, securing and protecting the City of Yonkers against any loss of the moneys so deposited. The action of the City Treasurer in procuring interest upon the following moneys in the following accounts is hereby approved: On average daily balance of accounts known as General Accounts, two per cent (2%) to be paid semi-annually on the 30th day of June and the 31st day of December; Firemen's Pension Fund, three and
462 one-half per cent (3½%); Police Pension Fund, three and one-half per cent (3½%); Saunders Trade Fund, three per cent (3%). The interest on the last mentioned accounts to be paid semi-annually on the 30th day of June and the 31st day of December in each year.

Adopted by the following vote:

Ayes—Mayor Fogarty, Council President Davis, Comptroller Loehr, Corporation Counsel Laragh and City Engineer Sheridan.

(Certified February 20, 1936).

463

Defendant's Exhibit E.

March 28, 1933

Received from the Treasurer of the City of Yonkers the following bonds:

15,000.	County of Jefferson 5s, 1947	11,250.
10,000.	State of Louisiana 4¾s—1978	7,500.
5,000.	" " 4½s—1953	4,000.
25,000.	City of Orlando, Fla. 5½s—1952	12,000.
25,000.	Canadian International Paper 6s—1949	5,250.
25,000.	Teaneck, N. J. 5½s—1934	17,500.
30,000.	Ohio Public Service 1953	24,000.
10,000.	South Bay Consolidated Water Co. 5s—1950	6,000.
5,000.	Laclede Gas Light Co. 5½s—35	2,400.
5,000.	New Orleans 4½s—1956	4,250.
15,000.	Butte, Montana 6s—41	11,250.
10,000.	Portsmouth, Va. 5s—54	7,700.
7,000.	Town of Huntington, L. I. 4½s—1946	5,915.
10,000.	Norfolk, Va. 4½s—1935	9,400.
197,000.		128,415.

464

465

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator

FIRST NATIONAL BANK & TRUST CO.,
Yonkers, N. Y.

466 *Defendant's Exhibit E.*

April 3rd, 1933

Received from the Treasurer of the City of Yonkers the following Bonds:

$50,000.	State of Arkansas	4½	1942	37.	$ 18,500.
55,000.	Town of Lyndhurst	5½		60	33,000.
50,000.	Commonwealth of Kentucky	4½		80	40,000.
14,000.	Winston-Salem, N. C.	4¾		90	12,600.
15,000.	State of South Dakota	5		89½	13,425.
3,000.	Bay City	4		80	2,400.
467 5,000.	Town of Greenburg	4½	1953	81.5	4,075.
1,000.	" " "	4½	1954	81¼	812.50
					$124,812.50

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator

FIRST NATIONAL BANK & TRUST CO.,
Yonkers, N. Y.

468

April 7, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

$15,000.	Norfolk, Va. 4½s—1935	@	94	14,100.
25,000.	Union, N. J. 6s—1934	@	80	20,000.
40,000.				34,100.

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
FIRST NATIONAL BANK & TRUST CO.
PERCIVAL W. TRUDEAU, Conservator

May 4, 1933

470

Received from the Treasurer of the City of Yonkers, the following bonds:

5,000.	City of Charlotte, N. C. 4½s due 1934
12,000.	Galveston, Texas 5s—1933-5
15,000.	Town of Greenburgh, N. Y. 4½s—1946
2,000.	Town of Huntington, L. I. 4½s—1938
2,000.	" " " 4½s—1945
10,000.	City of New York 4½s—1965
2,500.	State of Oregon 5½s—1938
2,500.	" " 5½s—1945
2,500.	" " 5½s—1945
2,500.	" " 5½s—1946
1,000.	Village of Sga Cliff, N. Y. 5s—1933
25,000.	State of New Mexico 6s—1935
6,000.	Seattle, Wash., 5s—1934
2,000.	" " 5s—1940

471

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
FIRST NATIONAL BANK & TRUST CO.
PERCIVAL W. TRUDEAU, Conservator

472 *Defendant's Exhibit E.*

May 16, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

$10,000. City & County of San Francisco, school bonds 5s of 1945

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

473 PERCIVAL TRUDEAU
FIRST NATIONAL BANK & TRUST CO.
PERCIVAL W. TRUDEAU, Conservator

Yonkers, N. Y., July 20, 1933

RECEIVED, from the Treasurer of the City of Yonkers the following bonds;

$2,000. OREGON STATE HIGHWAY 5½% bonds due Oct. 1, 1937; Nos. 5034 and 5035 $1,000 each

474 1,000 OREGON STATE HIGHWAY 5½% bond due Oct. 1, 1938; No. 5110 and
1,000 OREGON STATE HIGHWAY 5½% Bond due April 1938; No. 5072

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
FIRST NATIONAL BANK & TRUST CO.
PERCIVAL W. TRUDEAU, Conservator

475

Findings of Fact and Conclusions of Law Appended to the Opinion of the Court.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

THE CITY OF YONKERS,
Defendant.

L. 64-51.

476

I find:

(1) That the pledge of assets by the First National Bank and Trust Company of Yonkers, New York, to secure deposits by the City of Yonkers in the three several accounts, to wit: Treasurer of the City of Yonkers, $275,105.53; City of Yonkers, $1,502.84; and Neppenhan Sewer Fund, City of Yonkers, $621.88 was illegal and *ultra vires.* 477

(2) That the First National Bank and Trust Company was insolvent as of the 6th day of March, 1933, and that the rights of the general creditors of the First National Bank and Trust Company became fixed as of March 6, 1933.

(3) That all of the payments by the Conservator of the deposits aforesaid of the City of Yonkers were made with the view to the preference of the City of Yonkers over other creditors of the First National Bank and Trust Company.

478 *Findings of Fact and Conclusions of Law Appended to the Opinion of the Court.*

(4) That the payments of such deposits by the Conservator of the First National Bank and Trust Company to the City of Yonkers were not "permitted" payments as allowed under the authority of the Proclamation of the President of March 6, 1933, the Executive Order of March 10, 1933 and Regulation No. 10 of the Secretary of the Treasury.

(5) That no service of any notice of claim or of intention to sue by the first National Bank and Trust Company,
479 through its Receiver, was required.

(6) That the payments of the deposits aforesaid by the First National Bank and Trust Company to the City of Yonkers were voluntarily made under mistake of law by an officer of the United States and are recoverable.

(7) That the plaintiff is entitled to recover of the defendant the sum of $138,551.88, being the difference between the amount which the plaintiff should have received as a fifty per cent. dividend from the bank and the amount paid by the bank to the city on account of the three several
480 deposits aforesaid, with interest from April, 1936.

June 8, 1938.

JOHN KNIGHT,
United States District Judge.

481

Additional Findings of Fact.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, Plaintiff,

against

THE CITY OF YONKERS, Defendant.

L. 64-51.

482

This cause having duly come on to be tried by the Court without a Jury, and the allegations and proofs of the parties having been fully heard, and the Court having filed its opinion herein dated June 8, 1938, the Court now makes additional findings as follows:

1. Since September 30, 1929 The First National Bank and Trust Company of Yonkers has been a national banking corporation organized and existing under the laws of the United States with its principal place of business in the City of Yonkers, County of Westchester and State of New York. 483

2. A first dividend of 40% was made available to the general depositors of The First National Bank and Trust Company of Yonkers on December 16, 1933 and a second dividend of 10% was made available on November 3, 1937.

3. The plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $166,262.26 from May

484 *Additional Findings of Fact.*

1, 1936 to November 2, 1937 and interest at the same rate on the sum of $138,551.88 from November 3, 1937 to the date of the judgment to be entered herein and the costs of this action.

4. The withdrawals from the "Treasurer of the City of Yonkers" and the "City of Yonkers" accounts were on City of Yonkers payroll checks and represented salary payments, salary contributions to the City of Yonkers, salary garnishment payments and New York State retirement payments.

485 5. That the payments by the Bank prior to the appointment of the Conservator of the deposits of the City of Yonkers were made with the view to the preference of the City of Yonkers over other creditors of The First National Bank and Trust Company of Yonkers.

6. That the payments by the Bank prior to the appointment of the Conservator of such deposits were not "permitted" payments as allowed under the authority of the Proclamation of the President of March 6, 1933, the Executive Order of March 10, 1933 and Regulation No. 10 of the Secretary of the Treasury.

486 7. No statute of the state of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

8. No statute of the state of New York confers upon state banks the specific power to pledge assets to secure deposits of the City of Yonkers.

9. Under the common law of the state of New York, as declared by its highest court, state banks lack the power to pledge assets to secure deposits of political subdivisions of the state.

Defendant's Requests for Findings of Fact and Conclusions of Law. 48

10. No applicable ordinance or local law of the City of Yonkers confers upon any bank the power to secure deposits of the City of Yonkers.

Dated, July 18, 1938.

JOHN KNIGHT,
District Judge.

48

Defendant's Requests for Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

vs.

CITY OF YONKERS,
Defendant.

L. 64-51. 48

Comes now the above named defendant by Leonard G McAneny, Corporation Counsel of the City of Yonkers, its attorney, and considering the same to be material to the proper presentation of this case, respectfully requests the Court to make and enter the following findings of fact and conclusions of law.

490 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

FINDINGS OF FACT.

1. That The First National Bank and Trust Company of Yonkers was and is for all purposes of this action a National Banking Institution organized and existing under and by virtue of the laws of the United States of America, having its only place of business in the City of Yonkers, State of New York.

2. That the defendant City of Yonkers was and still is a municipal corporation organized and existing under and
491 by virtue of the laws of the State of New York.

3. That by a resolution adopted by the Board of Estimate and Apportionment of the City of Yonkers on July 10, 1929, certain banks were designated as depositaries "for all moneys of the City deposited by the City Treasurer" and the City Treasurer was directed to "continue to procure adequate security for all moneys deposited by him" in the designated depositaries.

4. That on March 4, 1933, The First National Bank and Trust Company of Yonkers, the successor by merger to three of the depositaries designated in the resolution of
492 the Board of Estimate and Apportionment of Yonkers of July 10, 1929, had on pledge with the City of Yonkers, bonds of the par value of $535,000 which had been procured by the City Treasurer of the City of Yonkers pursuant to said resolution of July 10, 1929, from time to time prior thereto to secure, among other deposits, deposits of the City of Yonkers made by said City Treasurer in three several accounts, to wit: Treasurer of the City of Yonkers, $275,105.53; City of Yonkers, $1,502.84; and Nepperhan Sewer Fund, City of Yonkers, $621.88.

5. That on March 4, 1933, the defendant, City of Yonkers, had on deposit in The First National Bank and Trust

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Company of Yonkers moneys in the accounts and sums as follows: Treasurer of the City of Yonkers, $275,105.53; City of Yonkers, $1,502.84; Nepperhan Sewer Fund, $621.88.

6. That the moneys on deposit in The First National Bank and Trust Company of Yonkers in the accounts, "Treasurer of the City of Yonkers" in the sum of $275,105.53, "City of Yonkers" in the sum of $1,502.84, and "Nepperhan Sewer Fund" in the sum of $621.88 were public funds.

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7. That on Saturday, March 4, 1933, the Governor of the State of New York issued a Proclamation declaring a banking holiday.

8. That the Governor's Proclamation of March 4, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

9. That The First National Bank and Trust Company was solvent on March 4, 1933.

10. That on Monday, March 6, 1933, the President of the United States issued a Proclamation declaring a banking holiday until March 9, 1933.

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11. That the President's Proclamation of March 6, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

12. That The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

13. That on March 9, 1933, the President of the United States issued a Proclamation continuing the Proclamation of March 6, 1933, until further proclamation by the President.

496 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

14. That the President's Proclamation of March 9, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

15. That The First National Bank and Trust Company of Yonkers was solvent on March 9, 1933.

16. That on March 20, 1933, pursuant to Bank Conservation Act of March 9, 1933, the Comptroller of the Currency appointed Percival W. Trudeau Conservator of The First National Bank and Trust Company of Yonkers.

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17. That The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

18. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers was under the management and control of its own officers.

19. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company was permitted to transact such business as any other bank was permitted to transact under the Presidential Proclamations of March 6, and 9, 1933.

498 20. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers had the right to make payments on account of payroll checks drawn against funds deposited prior to March 4, 1933.

21. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers paid out of the funds deposited prior to March 4, 1933, in the account "Treasurer, City of Yonkers" the sum of $98,180.79, upon payroll checks issued by the Treasurer of the City of Yonkers, such payments having been made in the following amounts on the following dates, respectively:

Mar. 9, 1933	$ 16.00	Mar. 14, 1933	$ 413.21
" 9, 1933	57.26	" 15, 1933	26,980.23
" 10, 1933	14,044.78	" 16, 1933	7,558.51
" 11, 1933	9,631.48	" 17, 1933	19,027.43
" 13, 1933	908.31	" 18, 1933	10,588.85
		" 20, 1933	8,954.73

22. That on March 28, 1933, Percival W. Trudeau, in consideration (1) of the City of Yonkers' releasing its lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City, (2) of the City's not foreclosing its said lien in the State Courts, (3) of the City's surrendering the said assets so deposited, agreed with the City of Yonkers that he would pay out the funds of the City of Yonkers remaining on deposit with The First National Bank and Trust Company provided the City would return the bonds deposited with the City as security as the funds were paid out. 500

23. That from March 21, 1933, to March 28, 1933, The First National Bank and Trust Company of Yonkers by and with the consent of Percival W. Trudeau, Conservator, paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Treasurer, City of Yonkers" the sum of $58,781.26 upon payroll checks issued by the Treasurer of the City of Yonkers, such payments having been made in the following amounts on the following dates, respectively: 501

Mar. 23, 1933	$36,036.43
" 24, 1933	911.45
" 25, 1933	18,103.01
" 26, 1933	49.50
" 27, 1933	3,680.87

502 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

24. That on March 28, 1933, pursuant to the said agreement between Percival W. Trudeau and the City of Yonkers, The City of Yonkers, in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for its deposits, of the par value of $197,000.

25. That on July 24, 1933, Louis B. Rossire was ap-
503 pointed Successor Conservator by the Comptroller of the Currency; that on January 23, 1934, the Comptroller of the Currency appointed Arthur E. Muth as Receiver of The First National Bank and Trust Company of Yonkers and on November 15, 1937, the said Comptroller appointed Walter F. Downey, plaintiff herein successor Receiver.

26. That from March 29, 1933, to January 23, 1934, The First National Bank and Trust Company of Yonkers, by and with the consent of Percival W. Trudeau, Conservator, and Louis B. Rossire, successor Conservator, voluntarily paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Treasurer, City of
504 Yonkers", the sum of $118,016.99 upon payroll checks issued by the Treasurer of the City of Yonkers, such payments having been made in the following amounts on the following dates, respectively:

Mar.	28, 1933	$ 723.07	May	8, 1933	$ 73.91
"	29, 1933	315.26	"	9, 1933	15.30
"	30, 1933	563.82	"	10, 1933	36.75
"	31, 1933	582.28	"	11, 1933	29.41
Apr.	1, 1933	73,571.12	"	15, 1933	47.25
"	3, 1933	2,377.34	"	17, 1933	30.61
"	4, 1933	9,345.75	"	20, 1933	27.22
"	5, 1933	627.12	"	23, 1933	9.65

Apr.	6, 1933	$ 584.99	May	24, 1933	$ 80.70
"	7, 1933	4,285.31	June	9, 1933	37.50
"	8, 1933	13,663.63	"	10, 1933	145.13
"	10, 1933	1,221.33	"	14, 1933	25.00
"	11, 1933	578.04	"	28, 1933	27.90
"	12, 1933	1,735.42	"	30, 1933	122.00
"	13, 1933	102.00	July	1, 1933	267.00
"	14, 1933	141.60	"	3, 1933	132.00
"	15, 1933	98.03	"	5, 1933	128.34
"	17, 1933	32.25	"	6, 1933	98.50
"	18, 1933	168.89	"	7, 1933	40.00
"	19, 1933	123.58	"	8, 1933	95.00
"	20, 1933	4,432.50	"	10, 1933	55.00
"	21, 1933	223.04	"	13, 1933	15.00
"	22, 1933	185.25	"	17, 1933	20.00
"	24, 1933	29.41	"	22, 1933	20.00
"	25, 1933	2.25	"	24, 1933	2.19
"	26, 1933	154.77	"	26, 1933	25.00
"	27, 1933	257.29	"	27, 1933	14.70
"	28, 1933	16.50	"	28, 1933	18.34
"	29, 1933	41.67	Aug.	10, 1933	9.00
May	2, 1933	34.41	Sept.	5, 1933	24.00
"	3, 1933	1.25	"	6, 1933	2.35
"	4, 1933	6.25	Dec.	22, 1933	27.00
"	5, 1933	22.73	Jan.	16, 1934	28.50
"	6, 1933	34.39	"	22, 1934	4.20

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leaving $126.49 remaining on deposit in said bank.

27. That the moneys paid out of the account "Treasurer, City of Yonkers" by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

508 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

28. That from March 29, 1933, to January 23, 1934, The First National Bank and Trust Company of Yonkers, by and with the consent of Percival W. Trudeau, Conservator, and Louis B. Rossire, successor Conservator, voluntarily paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "City of Yonkers", the sum of $1,502.84 upon payroll checks issued by the City of Yonkers, such payments having been made in the following amounts on the following dates, respectively:

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May 5, 1933	$ 48.00
July 7, 1933	253.70
July 8, 1933	472.00
July 10, 1933	172.00
July 11, 1933	160.34
July 12, 1933	164.00
July 13, 1933	122.80
July 14, 1933	60.00
July 18, 1933	25.00
July 21, 1933	25.00

29. That the money paid out of the account "City of Yonkers" by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

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30. That on May 4, 1933, The First National Bank and Trust Company of Yonkers, by and with the consent of Percival W. Trudeau, Conservator, voluntarily paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Nepperhan Sewer Fund" the sum of $621.88.

31. That the money paid out of the account "Nepperhan Sewer Fund" by The First National Bank and Trust

Company of Yonkers were payments made in the regular course of business of such bank.

32. That between March 29, 1933, and January 23, 1934, pursuant to the said agreement between Percival W. Trudeau and the City of Yonkers, the City of Yonkers, in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for its deposits, of the par value of $337,000 on the dates and in the amounts as follows:

April 3, 1933	$193,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

leaving $1,000 of said bonds in the hands of the City of Yonkers.

33. That Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, gave receipts to the City of Yonkers for the securities upon their surrender, each of which receipts contained the following provision:

> "Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers."

34. That on December 16, 1933, a first dividend of 40 per cent. and on November 3, 1937, a second dividend of 10 per cent. were made available to unsecured depositors of The First National Bank and Trust Company of Yonkers.

514 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

35. That the City of Yonkers was a secured depositor to the extent of deposits in the account "Treasurer, City of Yonkers" in the sum of $275,105.53.

36. That the City of Yonkers was a secured depositor to the extent of deposits in the account "City of Yonkers" in the sum of $1,502.84.

37. That the City of Yonkers was a secured depositor to the extent of deposits in the account "Nepperhan Sewer Fund" in the sum of $621.88.

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38. That the City of Yonkers had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company deposited with said City as security for the deposits of said City.

39. That no claim was ever filed with the City of Yonkers or any officer thereof for the claim alleged in the complaint herein.

40. That no notice of claim and no notice of intention to sue was ever filed with the City of Yonkers or any officer thereof with respect to the claim alleged in the complaint herein.

516

41. That The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

42. That all of the moneys paid by The First National Bank and Trust Company of Yonkers to the City of Yonkers out of the accounts "Treasurer, City of Yonkers", "City of Yonkers" and "Nepperhan Sewer Fund" were paid while said bank was solvent.

43. That no demand was ever made upon the City of Yonkers, its officers or employees for the return of any of the money sued for herein.

44. That the Treasurer of the City of Yonkers is and was a person receiving and depositing moneys belonging to the State of New York.

CONCLUSIONS OF LAW.

1. That the defendant is entitled to judgment dismissing the complaint with costs.

2. That the defendant, City of Yonkers, was and is a political subdivision of the State of New York, and was and is a city of the Second Class under Chapter 55 of the Laws 518
of 1909 of New York as amended.

3. That the funds deposited by the City of Yonkers in The First National Bank and Trust Company of Yonkers in accounts, "Treasurer, City of Yonkers", in the sum of $275,105.53, "City of Yonkers", in the sum of $1,502.84 and "Nepperhan Sewer Fund", in the sum of $621.88 were public funds.

4. That the Proclamation of the Governor of New York of March 4, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent. 519

5. That the Proclamation of the President of the United States of March 6, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

6. That the Proclamation of the President of the United States of March 9, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

7. That the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Com-

520 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

pany of Yonkers did not create a presumption that said bank was insolvent.

8. That the appointment of Louis D. Rossire, as successor Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

9. That solvency is presumed until the contrary is proved.

521 10. That The First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

11. That the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to March 20, 1933.

12. That the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

13. That the plaintiff is not entitled to recover deposits of the City of Yonkers paid out by The First National
522 Bank and Trust Company of Yonkers prior to its insolvency.

14. That the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

15. That the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the City of Yonkers prior to March 20, 1933.

16. That the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National

Bank and Trust Company of Yonkers to the City of Yonkers prior to January 23, 1934. 523

17. That a conservator of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

18. That a conservator of a national bank appointed by the Comptroller of the Currency is not an officer of the Court.

19. That a receiver of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller. 524

20. That a receiver of a national bank appointed by the Comptroller of the Currency is not an officer of the Court.

21. That the negotiation of a settlement of claims against The First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same was within the scope of the authority of Percival W. Trudeau, as Conservator of said bank.

22. That the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the City of Yonkers was based upon a good and valid consideration. 525

23. That the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the City of Yonkers constituted an accord and satisfaction.

24. That the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency.

25. That National Banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

26. That the validity, force and effect of the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the City of Yonkers is determined by the laws of New York, the place of making.

27. That the City of Yonkers was entitled to a preference in the payment of its funds upon liquidation of The First National Bank and Trust Company of Yonkers.

28. That under the law of the State of New York state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions thereof, in such banks.

29. That The First National Bank and Trust Company was authorized by law to give security for the safekeeping and prompt payment of public funds deposited with it by the City of Yonkers.

30. That The First National Bank and Trust Company of Yonkers' depositing assets with the City of Yonkers as security for the said City's deposits of public funds was lawful.

31. That the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among other deposits, deposits by the City of Yonkers in the accounts, "Treasurer, City of Yonkers", in the sum of $275,105.53, "City of Yonkers", in the sum of $1,502.84, "Nepperhan Sewer Fund", in the sum of $621.88, was lawful.

529

32. That the City of Yonkers was a secured depositor of The First National Bank and Trust Company of Yonkers.

33. That if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with the City of Yonkers should serve as security for all of said City's deposits was beyond the powers of the said Bank, the rights and obligations of the plaintiff and defendant arising therefrom are determined by the laws of the State of New York.

530

34. That in order to repossess itself of the assets, given to secure the deposits of the City of Yonkers, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to the City of Yonkers.

35. That the payments of deposits between March 4, 1933, and March 20, 1933, to the City of Yonkers by The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

531

36. That the payments of deposits between March 20, 1933, and March 28, 1933, to the City of Yonkers by the Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

37. That the payments of deposits between March 28, 1933, and January 23, 1934, to the City of Yonkers by the Conservator and successor Conservator of The First National Bank and Trust Company of Yonkers were "per-

532 mitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

38. That the City of Yonkers was a creditor of The First National Bank and Trust Company of Yonkers.

39. That the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as security for the indebtedness.

533

40. That the City of Yonkers had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with said City as security for the deposits of said City.

41. That this action was not commenced within the time limited by law.

42. That the City of Yonkers is prohibited by law from paying the claim alleged in the complaint.

43. That the City of Yonkers is prohibited by law from paying any claims unless a claim therefor, verified by or
534 on behalf of the claimant, and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller, and shall have been audited and allowed by him.

44. That the City of Yonkers is not liable in a civil action for damages or injuries to person or property, or invasion of personal or property rights, of any name or nature whatsoever, arising at law or in equity, alleged to have been caused or sustained by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the City, or any of its agents, officers or employees, unless a claim therefor in writing,

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verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or on account of which the claim arose, be presented to the common council and served upon the Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall be commenced thereon within one year after the happening of such accident or injury or the occurrence of such act, omission, fault or neglect.

536

In the event of a denial by the Court of defendant's requests for the foregoing findings of fact and conclusions of law or any part thereof, defendant respectfully requests the Court to grant an exception or exceptions to defendant.

Defendant also respectfully requests the Court to grant exceptions to the findings of the Court numbered 1, 2, 3, 4, 5, 6 and 7 contained in the Court's findings dated June 8, 1938.

Dated: Yonkers, N. Y., July 8, 1938.

Respectfully submitted,

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LEONARD G. MCANENY,
Attorney for Defendant.

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Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,
539 *against*
THE CITY OF YONKERS,
Defendant.

L. 64-51.

Appearances:

BENJAMIN W. MOORE, Yonkers, N. Y.; for Plaintiff.

LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y.; and MORRIS L. ROSENWASSER and HAROLD T. GARRITY, of Counsel, for Defendant.

540

KNIGHT, District Judge:

The Court finds with respect to the Defendant's proposed Findings of Fact and concludes as to the Conclusions of Law submitted in this case as follows:

FINDINGS OF FACT.

1. Found.
2. Found.
3. Found.

Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law. 541

4. Found.

5. Found.

6. Found.

7. Found.

8. Found.

9. Refused.

10. Found.

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11. Found.

12. Refused.

13. Found.

14. Found.

15. Refused.

16. Found.

17. Refused.

18. Refused.

19. Refused.

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20. Refused.

21. Found, except that same should show payment of March 20, 1933, as made by Conservator.

22. Refused.

23. Found.

24. Refused.

25. Found.

26. Found, except date March 29, 1933, and except date January 22, 1934.

Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law.

27. Refused.
28. Found, except date May 5, 1933.
29. Refused.
30. Found.
31. Refused.
32. Refused.
33. Found.
34. Found.
35. Refused.
36. Refused.
37. Refused.
38. Refused.
39. Found.
40. Found.
41. Refused.
42. Refused.
43. Found.
44. Refused.

CONCLUSIONS OF LAW.

1. Refused.
2. Found.
3. Found.
4. Found.

Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law.

5. Found.
6. Found.
7. Refused.
8. Refused.
9. Refused.
10. Refused.
11. Refused.
12. Refused.
13. Refused.
14. Refused.
15. Refused.
16. Refused.
17. Found.
18. Found.
19. Found.
20. Found.
21. Refused.
22. Refused.
23. Refused.
24. Refused.
25. Refused.
26. Refused.
27. Refused.

550 *Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law.*

28. Refused.

29. Refused.

30. Refused.

31. Refused.

32. Refused.

33. Refused.

34. Refused.

551

35. Refused.

36. Refused.

37. Refused.

38. Found.

39. Refused.

40. Refused.

41. Refused.

42. Refused.

552 43. Refused.

44. Refused.

July 18, 1938

JOHN KNIGHT,
United States District Judge.

Filed July 29, 1938

553

Defendant's Exceptions.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

554

THE CITY OF YONKERS,
Defendant.

Exceptions are allowed the defendant as noted in the stenographic minutes of the trial herein, and to the findings numbered 1, 2, 3, 4, 5, 6 and 7 contained in the findings of the Court dated June 8, 1938, and to the findings numbered 3, 5, 6, 7, 8, 9 and 10 of the additional findings of the Court, dated July 18, 1938, and to the denial of findings of fact numbered 9, 12, 15, 17, 18, 19, 20, 21, 22, 24, 26, 27, 28, 29, 31, 32, 35, 36, 37, 38, 41, 42, 44 and to the denial of conclusions of law numbered 1, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43 and 44 as requested by defendant, this 27th day of October, 1938. 555

JOHN KNIGHT,
U. S. D. J.

and the defendant prays that its bill of exceptions may be allowed, settled and signed.

LEONARD G. MCANENY,
Attorney for Defendant.

556 *Order Settling Bill of Exceptions.*

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the bill of exceptions herein contains all the material facts, proceedings, rulings and exceptions thereto occurring upon the trial of this cause and not heretofore a part of the record herein and that the exhibits set forth or referred to constitute all the exhibits offered in evidence at the said trial and that the same may be settled and allowed in the form proposed and submitted and ordered on file as a bill of exceptions herein.

557 Dated, Yonkers, New York, November 17, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Attorney for Defendant.

Order Settling Bill of Exceptions.

558 It appearing that the foregoing bill of exceptions contains all of the material facts, matters, things, proceedings, rulings, and exceptions thereto, occurring upon the trial of this cause, and not heretofore a part of the record herein, including all evidence adduced at the said trial, and that the exhibits set forth in the foregoing bill of exceptions constitute all of the exhibits offered in evidence in the said trial,

I hereby settle and allow the foregoing bill of exceptions as a full, true and correct bill of exceptions in this cause and order the same on file, and further order the clerk of this court to transmit said entire bill of exceptions to the Circuit Court of Appeals for the Second Circuit.

Dated this 18th day of November, 1938.

JOHN KNIGHT,
U. S. D. J.

Opinion of the Court.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,
against
THE CITY OF YONKERS,
Defendant.

L. 64-51.

Appearances:

BENJAMIN W. MOORE, Yonkers, N. Y., for Plaintiff.

LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y., MORRIS L. ROSENWASSER, and HAROLD T. GARRITY, of Counsel, for Defendant.

Hon. JOHN KNIGHT, District Judge:

On March 4, 1933, the defendant, City of Yonkers, New York, had on deposit in the First National Bank and Trust Company of Yonkers, New York, moneys in the accounts and sums hereinafter named, to wit: (1) Treasurer of the City of Yonkers, $275,105.53; (2) City of Yonkers, $1,502.84; (3) Nepperhan Sewer Fund, $621.88. A Bank Holiday was proclaimed by the Governor of New York on March 4, 1933, and by the President of the United States on March 6, 1933. The Comptroller of the Currency, pursuant to statute, appointed a Conservator of the First National Bank and Trust Company (hereinafter called bank) on March 20,

1933, and a successor Conservator on July 24, 1933. A Receiver was appointed on January 23, 1934, and the Plaintiff as Successor to such Receiver was appointed on November 15, 1937. The latter has continued to act since the last stated date. The bank never opened its doors for the transaction of regular business after March 4, 1933.

The purported authority for the deposit of the funds aforesaid is a resolution adopted by the Board of Estimate and Apportionment of the City of Yonkers on July 10, 1929. Such resolution designated five several banks as depositaries "for all moneys of the City deposited by the City
563 Treasurer," and it directed the City Treasurer to "continue to procure adequate security for all moneys deposited by him * * *" in the designated depositaries. On September 30, 1929, three of the aforesaid depositaries were merged under the name of the First National Bank and Trust Company of Yonkers, New York.

On March 4, 1933, the bank had on deposit with the City as security for the aforesaid accounts bonds of the par value of $535,000.00. Between March 8, 1933 and January 23, 1934, inclusive, the City of Yonkers (hereinafter designated City) by various checks withdrew $274,979.04 of the aforesaid account of $275,105.53 (designated "Treas-
564 urer, the City of Yonkers"); between May 23, 1933 and July 21, 1933, inclusive the City withdrew the entire aforesaid account, "City of Yonkers" in the sum of $1,502.84; and on May 4th, 1933, it withdrew the entire balance of $621.88 in the "Nepperhan Sewer account." All the withdrawals aforesaid, except the Nepperhan Sewer account, were on pay roll checks issued by the City. Between March 29, 1933 and July 20, 1933 inclusive, the City returned to the bank the aforesaid pledged securities to the amount of $534,000. The Conservator gave receipts for such securities, reciting therein that they were "without prejudice to the City of Yonkers." The depositors of the bank have been paid a

dividend of fifty per cent. This suit is brought to recover the difference between the amount which the City would receive as a fifty per cent. dividend upon such deposits and $277,103.76, the amount actually paid the City through the above mentioned withdrawals. The basis of the alleged cause of action is that the pledges by the bank to secure Defendant's deposits were illegal, void and *ultra vires*. The answer denies that and also presents several other alleged defenses. The foregoing statement of facts is not disputed.

There is no federal statute giving authority to federal banks to pledge securities for deposits generally. There are numerous statutes authorizing this in specific instances. State banks in different states were given authority by state law to pledge their assets in certain cases, and, in order to equalize the footing in this respect between state and federal banks, Chapter 604, 46 Stat. 809 was enacted. That provides that a federal bank may, upon the deposit of public money of a state or any political subdivision thereof, • • • "give security for the safe keeping and prompt payment of the moneys so deposited, of the same kind as is authorized by the law of the state of which such association is located in the case of other banking institutions in the state." This statute has received interpretation by the Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, with respect to private deposits, and in *Marion* v. *Sneeden*, 291 U. S. 262, in respect to public deposits. *Vide* also *Griffin* v. *Royall*, 70 F. (2d) 103; *Leonard* v. *Gage*, 94 F. (2d) 19; *Redfield Ind. School Dist. No. 20* v. *Schnetzer*, 94 F. (2d) 257. It is not questioned that the deposits aforesaid were public funds. Said the Court in *Marion* v. *Sneeden, supra:* "A national bank could not legally pledge assets to secure the fund of a State, or of a political subdivision thereof, prior to the 1930 amendment; and since then it can do so legally only if it is located in a State in which state banks are so authorized." The controlling ques-

tion then is whether a state bank in the State of New York was authorized to secure deposits of public funds by the City of Yonkers, which is a city of the second-class as defined by statute. Concededly there is no specific statute in New York authorizing such a pledge. Defendant contends that such state banks have the implied power to do this, and that such power is "established and recognized by practice, public policy, the decisions of the courts and the legislative policy of enacting statutes," that the common law as declared by the courts authorized pledging these securities in state banks and, therefore, the acts complained
569 of were legal.

Numerous provisions are found in the statutes of the State of New York authorizing the pledging of assets to secure specified public funds. These are found in the State Finance Law, the County Law, the Education Law, the Village Law and certain city charters. The enactment of these statutes denies rather than affirms any public policy recognizing the right to make these pledges. As was said by the Attorney General of the State of New York in opinion under date of June 15, 1933, in referring to these various provisions: "It will be noted that all of the provisions thus far herein cited concern themselves with the deposit
570 of public moneys * * *. This might lead to the conclusion that in the absence of a special act therefor banks may not give security for deposits made by public officers and agents."

In *Hellawell* v. *Town of Hempstead*, 10 F. Supp. 771; in *Matter of Broderick*, 140 Misc. (N. Y.) 861; and *Matter of Spencerport*, 143 Misc. (N. Y.) 196; it was in effect held that the public policy of the State of New York authorizes state banks to "pledge their assets as security for public moneys * * *." It is pointed out in this connection that; by the Enabling Act of 1930, the bank may give security of the same kind as "is authorized by the law of the state in

which such association is located," and that this use of the word "law" in the place of the word "statute" has significance as conveying a broader meaning than "statute." Granting such interpretation, the "law" is what the highest court of the State of New York has said it is. The last above decisions must yield to the decision of the Court of Appeals, as the highest court. "An authority for determination of the question * * * can be given only by its highest court." *Marion* v. *Sneeden, supra*. The Court of Appeals of the State of New York has spoken, and it has determined the law of that state. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175; *City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400. Defendant reads the opinion in *State Bank of Commerce* v. *Stone, supra*, as recognizing an implied power to pledge securities. Careful reading of the opinion refutes this claim. The Court said: "Whatever doubt there may have been regarding the power of banks to secure deposits of public moneys has been removed by statute." (It there refers to three specific statutes, to wit: State Finance Law, County Law and Greater New York Charter.) And further, "An act of the legislature was evidently thought necessary even as to public moneys to enable banks to pledge certain securities for undertakings or deposits." Such include the last three enactments above mentioned. Said the Court in *City of Mount Vernon* v. *Mount Vernon Trust Co., supra:* "No question remains that this pledge of the defendants to secure deposits was *ultra vires* as to both parties." The Attorney-General of the State of New York passed upon the precise question at issue here, and he concluded that: "In the absence of express statutory provision, banks cannot pledge their assets to secure deposits of such public moneys. Thus, in answering your direct question, it is my opinion that deposits made by * * * city treasurers, * * * and similar local officers and agencies of public

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574 *Opinion of the Court.*

moneys received in such official capacity, cannot be secured by a pledge of bank securities in the absence of express statutory authority."

Banks are the creation of statute. Their authority is necessarily limited strictly by statute. Pledge of deposits may lead to serious injury to unsecured depositors. Authority based on implied power must be clearly established.

The President's Proclamation of March 6, 1933, provided that the Secretary of the Treasury, with the approval of the President, under an adopted regulation, had power
575 "to permit any or all of such banking institutions to perform any or all of the banking functions." An Executive Order of the President of March 10, 1933, continued the status of banks as in the Proclamation aforesaid, with certain modifications here immaterial. Under the authority of the Proclamation and Executive Order aforesaid, the Secretary of the Treasury adopted Regulation No. 9, which, among other things, provided that: "Any National or State banking institution may exercise its usual banking functions to such extent as its situation shall permit and as shall be absolutely necessary to meet the needs of its community for food, medicine, other necessities of life, • • •
576 for the payment of usual salaries and wages; for necessary current expenses and for the purpose of maintaining employment, and for other similar essential purposes, • • • provided (3) no national banking association shall engage in any transaction under this Section which is in violation of any Federal law • • •. Each banking institution and its directors and officers will be held strictly accountable for the faithful performance, with the spirit and purpose, as well as the letter of this regulation." If the bank was insolvent when these payroll checks were paid, payment was in violation of the statute (Title 12, Sec. 91 USC) (Rev. Stat. 5242), and payment of such checks was prohibited; otherwise they were permitted payments.

There is no direct proof of the insolvency of the bank prior to January 23, 1934, when the Receiver was appointed. There is no specific allegation in the Complaint herein that the bank was insolvent. The Complaint sets out the various proceedings relative to the suspension of business, the appointment of the Conservator and his successor and the appointment of the Receiver. Defendant contends that the burden rests upon the Plaintiff to establish insolvency. It seems to me, under the circumstances in the case, that a presumption of insolvency as of March 6, 1933, arises and continues to the time of the appointment of a Receiver, since the bank never opened its doors for the transaction of regular business after March 6, 1933. The Conservator was appointed less than two weeks from the date of closing, and a Conservator or Conservators continued in possession until the appointment of a Receiver.

The Act of March 9, 1933, (48 Stat. 2, 12 USC, 201) provides for the appointment of a Conservator to "take possession of the books and take such action as may be necessary to conserve the assets of such bank, pending further disposition of its business as provided by law." Treasury Regulation 30 authorizes the Conservator to transact a limited business of the bank as authorized by aforesaid Regulation 10. The purpose of the appointment of a Conservator is to hold matters in status quo pending a receivership or some change which may allow the bank to reopen. Between the official closing of a bank and the appointment of a Conservator or Receiver, additional liabilities may not be imposed upon the assets of a bank. *Bryce* v. *National City Bank of New Rochelle*, 17 F. Supp. 792. Section 203 USC, in part, provides: "During the time as such Conservator remains in possession of such bank, the rights of all parties with respect thereto shall be subject to the other provisions of this sub-chapter 8 the same as if a Receiver had been appointed therefor." It follows therefore that the rights of

580 creditors relate back to the date of the closing of the bank pursuant to the President's Proclamation of March 6, 1933. *Goess* v. *Heckscher*, Opinion by Knox, J. (D. J. S. D. N. Y.): *Hardee* v. *Washington Loan & Trust Co.*, 91 F. (2d) 314; *Mine Safety Appliance Co.* v. *Dehm*, Feb. 3, 1938; *Bryce* v. *National City Bank of New Rochelle*, *supra*. In *Payne* v. *Jackman*, 12 F. Supp. 653 and *Aufderheide* v. *Mine Safety Appliance Co.*, 9 F. Supp. 653, it is held that these rights relate back to the time of the appointment of a Conservator. Presumptively the bank was insolvent when all of the deposits in question were paid out. Payment thereof was pro-
581 hibited by Section 91 USC, *supra*, and also Regulation No. 9.

Payment of these payroll accounts to defendant constituted a preference. Pledge of these securities was illegal and *ultra vires*.

The Court of Appeals of the State of New York, both in *State Bank of Commerce* v. *Stone* and *City of Mount Vernon* v. *Mount Vernon Trust Co.*, *supra*, has stated that where an insolvent bank has pledged its assets to secure deposits of public funds, it cannot repossess itself of such assets until there is paid back the deposits secured. That is not the federal law. While the aforesaid amendment of 1930 describes the application of the state law in deter-
582 mining whether a pledge is or is not illegal, it says nothing about the effect of an illegal pledge. The federal courts have many times held and in cases as recent as *Sneeden* v. *City of Marion*, *supra*, and *Texas & Pacific Ry.* v. *Pottorff*, *supra*, that payments voluntarily made by an officer of the United States under mistake of law can be recovered. Said the court in *City of Marion* v. *Sneeden*, *supra*: "Since the herein bank was without power to make the pledge of bonds here in question, its Receiver is entitled to recover them unconditionally in order that they may be administered for the benefit of the general creditors of the bank." *Leonard* v. *Gage*, 94 F. (2d) 19; *Redfield Independent School Dist.* v.

Schnetzer, 94 F. (2d) 257; *O'Connor* v. *Rhodes*, 79 F. (2d) 146; *Granzow* v. *Village of Lyons, Ill.*, 89 F. (2d) 83, and many other cases are to the same effect. The instant case does not come within the purview of *Erie Ry. Co.* v. *Harry J. Thompkins*, decided April 25, 1938, unreported. The regulation of the conduct of the federal banks is peculiarly in the power of the federal government. As seen, the courts have interpreted the power of national banks with respect to payments made under mistake of law. The subject matter itself does not involve a question of the law of the State of New York as declared by its courts.

No notice of claim or intention to sue was served. This was not required. Defendant claims it was by virtue of the language in Sections 64 and 244 of the Second-Class Cities Law of the State of New York (Chap. 55 Laws of 1909). Section 64 contains no provision with reference to any suits brought on claims. Its language is in no wise applicable to a claim such as made here. *Marcy* v. *City of Syracuse*, 199 A. D. 246. Section 244 provides that the city shall not be liable in certain cases unless a claim in writing and notice of intention to sue have been given. The section applies only to suits sounding in tort. It is applicable only to an action "for damages or injuries to person or property * * * alleged to have been caused or sustained * * * by or because of any omission of duty, wrongful act, fault, negligence, misfeasance or negligence * * *." *Marcy* v. *City of Syracuse, supra.* Citation is made of *Reining* v. *City of Buffalo*, 102 N. Y. 308, in which it was said: "It attaches to all actions whatsoever * * *." That case construed a City of Buffalo Charter which was entirely different in effect from the Second-Class City Charter Law Sec. 244. In *Thamann* v. *City of Rochester*, 256 N. Y. 165, it was said: "The statute tells us that notice shall be given whenever damages are demanded, whether the claim is one 'arising at law or in equity,' * * *," and opinions in several cases

in the courts of New York State. Examination of each of these will disclose that each is an action in tort or sounding in tort.

The deposit in the aforesaid "Nepperhan Sewer Fund, City of Yonkers" was of moneys received, by the City of Yonkers from the County of Westchester, for the sale of a public sewer. Westchester County Sewer Act, Chapter 603 of the Laws of 1926, as amended by Chapter 658 of the Laws of 1927, and Section 13, provides that the Sewer Commission may purchase existing sewerage works and that the amount paid therefor be used by the municipality, City of Yonkers, first to pay outstanding obligations against sewerage work sold and second, the remainder to be credited to general fund of the municipality. There would seem to be little doubt that this is a deposit of public funds. However, it makes no difference whether it is a public or private fund. Pledging of assets to secure private deposits is without authority in law. *Texas & Pacific Ry.* v. *Pottorff*, *supra*; *Buckley* v. *Southwestern National Bank*, 88 F. (2d) 263; *State Bank of Commerce* v. *Stone*, *supra*. What has heretofore been said with reference to the other deposits made with the bank is applicable to this particular deposit.

I find:

(Findings printed at pages 159, 160.)

This opinion is to be taken asand for the Findings of Fact and Conclusions of Law required by the Practice. Any deficiency in this respect may be supplied by the submission to the Court of additional findings and the signing thereof by the Court.

June 8, 1938.

JOHN KNIGHT,
United States District Judge.

Filed on or about June 13, 1938.

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Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

THE CITY OF YONKERS,
Defendant.

L. 64-51.

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The issues in this action having been regularly brought on for trial before Hon. John Knight, District Judge, on the 5th and 6th days of January, 1938, without a jury, and the plaintiff having appeared by Benjamin W. Moore, his attorney, and Milton L. Romm, of counsel, and the defendant having appeared by Leonard G. McAneny, Esq., Corporation Counsel, and Morris L. Rosenwasser, Esq. and Harold T. Garrity, Esq., Assistant Corporation Counsels, 591
and the court having heard the allegations and proofs of the parties and having filed its opinion dated June 8, 1938 and its findings dated July 18, 1938, directing judgment as hereinafter stated, and the costs of the plaintiff having been duly taxed at $74.15,

Now, on motion of Benjamin W. Moore, attorney for the plaintiff, it is

ADJUDGED that the plaintiff, Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, do recover of the defendant, The City of Yonkers, the sum of $138,551.88 together with inter-

est thereon in the sum of $21,344.71 and the sum of $74.15 costs as taxed, making in all the sum of $159,970.74, and that the plaintiff have execution therefor against the defendant, The City of Yonkers.

Judgment signed this 5th day of August, 1938.

CHARLES WEISER,
Clerk.

Opinion of Court on Applicability of Rules of Civil Procedure.

The motion in each of these cases for an order limiting exceptions herein pursuant to new Rule 46 is denied. Irrespective of the question of whether new Rule 86 applies to actions in which final judgment had been entered prior to the effective date of the new rules, it is my view that the application of the new rules would not be feasible and work injustice to the defendant (*sic*).

An order may be submitted to conform to this communication.

JOHN KNIGHT,
U. S. D. J.

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Order Denying Motion to Apply New Rules on Appeal.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court House thereof in the Borough of Manhattan, City of New York, on the 18th day of October, 1938.

Present:

HON. JOHN KNIGHT,
District Judge.

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WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.
Plaintiff,

against

THE CITY OF YONKERS,
Defendant.

L. 64-51.

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The defendants having moved this Court for an order invoking the application of the Federal Rules of Civil Procedure to this action with respect to Rule 46 eliminating the necessity for exceptions and Rule 73 eliminating the necessity of assignments of error, and said motion having been submitted by Leonard G. McAneny, Esq., attorney for the defendants, and by Benjamin W. Moore, attorney for the plaintiff, by Milton L. Romm, of counsel,

Now, on reading and filing the notice of motion dated the 20th day of September, 1938 and the affidavit of Leonard G. McAneny, thereto annexed, verified the 20th day of Sep-

598 *Petition and Order Allowing Appeal.*

tember, 1938, in support of said motion, and the affidavit of Benjamin W. Moore, verified the 3rd day of October, 1938, in opposition thereto, it is

ORDERED, that the motion be and it hereby is in all respects denied.

JOHN KNIGHT,
District Judge.

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Petition and Order Allowing Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

600 THE CITY OF YONKERS,
Defendant.

L. 64-51.

To the Honorable William Bondy, Judge of the District Court, sitting for the Southern District of New York:

Now comes the defendant-appellant, The City of Yonkers, by Leonard G. McAneny, its attorney, and feeling itself aggrieved by the judgment of this Court entered on the 5th day of August, 1938, hereby prays that an appeal may

be allowed to it from said judgment, to the United States Circuit Court of Appeals for the Second Circuit, and that citation issue, and, in connection with this petition, petitioner herewith presents its assignment of errors.

Petitioner further prays that an order be made fixing the amount of the bond to be given by defendant for costs, and a proper transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, shall be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated: Yonkers, New York, October 28th, 1938.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for defendant-appellant.

The above appeal is hereby allowed.

Dated: New York, N. Y., October 31st, 1938.

WM. BONDY,
U. S. D. J.

A bond for costs in the usual form was duly approved and filed in the office of the Clerk of the Court on October 31, 1938.

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Assignments of Error and Prayer for Reversal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

THE CITY OF YONKERS,

Defendant.

L. 64-51.

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Now comes the defendant-appellant, The City of Yonkers, by Leonard G. McAneny, Corporation Counsel, its attorney, and submits, presents and files its assignments of error complained of and says:

That in the records and proceedings of the Honorable United States District Court for the Southern District of
606 New York in a certain action entitled "Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, plaintiff, against The City of Yonkers, defendant", and in the determination of the issues raised, there is manifest error to the injury and prejudice of the said appellant, and for such error the appellant assigns the following:

1. The said Court erred in ruling that the pledge of assets by The First National Bank and Trust Company of Yonkers to secure deposits by the City of Yonkers in the account "Treasurer, City of Yonkers", in the sum of $275,105.53 was illegal and *ultra vires*.

2. The said Court erred in ruling that the pledge of assets by The First National Bank and Trust Company of Yonkers to secure deposits by the City of Yonkers in the account "City of Yonkers", in the sum of $1,502.74 was illegal and *ultra vires.*

3. The said Court erred in ruling that the pledge of assets by The First National Bank and Trust Company of Yonkers to secure deposits by the City of Yonkers in the account "Nepperhan Sewer Fund", in the sum of $621.88 was illegal and *ultra vires.*

4. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 4, 1933.

5. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

6. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 9, 1933.

7. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

8. The said Court erred in failing to find that from March 6, 1933 to March 20, 1933 The First National Bank and Trust Company of Yonkers was under the management and control of its own officers.

9. The said Court erred in failing to find that from March 6, 1933 to March 20, 1933 The First National Bank and Trust Company of Yonkers was permitted to transact

such business as any other bank was permitted to transact under the Presidential Proclamations of March 6th and 9th, 1933.

10. The said Court erred in failing to find that from March 6, 1933 to March 20, 1933 The First National Bank and Trust Company of Yonkers had the right to make payments on account of payroll checks drawn against funds deposited prior to March 4, 1933.

611 11. The said Court erred in failing to find that on March 28, 1933 Percival W. Trudeau in consideration (1) of the City of Yonkers' releasing its lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City, (2) of the City's not foreclosing its said lien in the state courts, (3) of the City's surrendering the said assets so deposited, agreed with the City of Yonkers that he would pay out the funds of the City of Yonkers remaining on deposit with The First National Bank and Trust Company provided the City would return the bonds deposited with the City as security as the funds were paid out.

612 12. The said Court erred in failing to find that on March 28, 1933 pursuant to the said agreement between Percival W. Trudeau and the City of Yonkers, the City of Yonkers, in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds held by the said City as security for its deposits of the par value of $197,000.

13. The said Court erred in failing to find that the moneys paid out of the account "Treasurer, City of Yonkers", by The First National Bank and Trust Company of

Yonkers were payments made in the regular course of business of such bank.

14. The said Court erred in failing to find that the money paid out of the account "City of Yonkers", by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

15. The said Court erred in failing to find that the money paid out of the account "Nepperhan Sewer Fund", by The First National Bank and Trust Company of Yonkers 614
were payments made in the regular course of business of such bank.

16. The said Court erred in failing to find that between March 29, 1933 and January 23, 1934 pursuant to the said agreement between Percival W. Trudeau and the City of Yonkers, the City of Yonkers, in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivering to said Percival W. Trudeau, Conservator, bonds held by the said City as security for its deposits, of the par value of $337,000 on the dates and in the amounts as 615
follows:

Date	Amount
April 3, 1933	$193,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

leaving $1,000 of said bonds in the hands of the City of Yonkers.

616 *Assignments of Error and Prayer for Reversal.*

17. The said Court erred in failing to find that the City of Yonkers was a secured depositor to the extent of deposits in the account "Treasurer, City of Yonkers", in the sum of $275,105.53.

18. The said Court erred in failing to find that the City of Yonkers was a secured depositor to the extent of deposits in the account "City of Yonkers", in the sum of $1,502.84.

19. The said Court erred in failing to find that the City of Yonkers was a secured depositor in the account "Nepper-
617 han Sewer Fund", in the sum of $621.88.

20. The said Court erred in failing to find that the City of Yonkers had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company deposited with said City as security for the deposits of said City.

21. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

618 22. The said Court erred in failing to find that all of the moneys paid by The First National Bank and Trust Company of Yonkers out of the accounts "Treasurer, City of Yonkers", "City of Yonkers" and "Nepperhan Sewer Fund", were paid while said bank was solvent.

23. The said Court erred in failing to find that the Treasurer of the City of Yonkers is and was a person receiving and depositing moneys belonging to the State of New York.

24. The said Court erred in failing to make the conclusion of law that the appointment of Percival W. Trudeau

as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

25. The said Court erred in failing to make the conclusion of law that the appointment of Louis D. Rossire as successor Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

26. The said Court erred in failing to make the conclusion of law that solvency is presumed until the contrary is proved. 6

27. The said Court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

28. The said Court erred in failing to make the conclusion of law that the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to March 20, 1933. 6

29. The said Court erred in failing to make the conclusion of law that the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

30. The said Court erred in failing to make the conclusion of law that the plaintiff is not entitled to recover deposits of the City of Yonkers paid out by The First National Bank and Trust Company of Yonkers prior to its insolvency.

622 *Assignments of Error and Prayer for Reversal.*

31. The said Court erred in failing to make the conclusion of law that the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

32. The said Court erred in failing to make the conclusion of law that the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the City of Yonkers prior to March 20, 1933.

623 33. The said Court erred in failing to make the conclusion of law that the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the City of Yonkers prior to January 23, 1934.

34. The said Court erred in failing to make the conclusion of law that the negotiation of a settlement of claims against The First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the sum was within the scope of the authority of Percival W. Trudeau as Con-
624 servator of said bank.

35. The said Court erred in failing to make the conclusion of law that the agreement of March 28, 1933 between Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers and the City of Yonkers was based upon a good and valid consideration.

36. The said Court erred in failing to make the conclusion of law that the agreement of March 28, 1933 between Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers and the City of Yonkers constituted an accord and satisfaction.

37. The said Court erred in failing to make the conclusion of law that the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Curreney.

38. The said Court erred in failing to make the conclusion of law that national banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

39. The said Court erred in failing to make the conclusion of law that the validity, force and effect of the agreement of March 28, 1933 between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the City of Yonkers is determined by the laws of New York, the place of making.

40. The said Court erred in failing to make the conclusion of law that the City of Yonkers was entitled to a preference in the payment of its funds upon liquidation of The First National Bank and Trust Company of Yonkers.

41. The said Court erred in failing to make the conclusion of law that under the law of the State of New York state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions thereof, in such banks.

42. The said Court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers was authorized by law to give security for the safekeeping and prompt payment of public funds deposited with it by the City of Yonkers.

628 *Assignments of Error and Prayer for Reversal.*

43. The said Court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers' deposit of assets with the City of Yonkers as security for the said City's deposit of public funds was lawful.

44. The said Court erred in failing to make the conclusion of law that the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among other deposits, deposits by the City of Yonkers in the accounts "Treasurer, City of Yonkers", in the sum of
629 $275,105.53, "City of Yonkers", in the sum of $1,502.84, "Nepperhan Sewer Fund" in the sum of $621.88, was lawful.

45. The said Court erred in failing to make the conclusion of law that the City of Yonkers was a secured depositor of The First National Bank and Trust Company of Yonkers.

46. The said Court erred in failing to make the conclusion of law that if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers
630 with the City of Yonkers should serve as security for all of said City's deposits was beyond the powers of the said banks, the rights and obligations of the plaintiff and defendant arising therefrom are determined by the laws of the State of New York.

47. The said Court erred in failing to make the conclusion of law that in order to repossess itself of the assets given to secure the deposits of the City of Yonkers, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to the City of Yonkers.

48. The said Court erred in failing to make the conclusion of law that the payments of deposits between March 4, 1933 and March 20, 1933 to the City of Yonkers by The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the Proclamation of the President of March 6, 1933, the Executive Order of March 10, 1933, and Regulation #10 of the Secretary of the Treasury.

49. The said Court erred in failing to make the conclusion of law that the payments of deposits between March 20, 1933 and March 28, 1933 to the City of Yonkers by the Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the Proclamation of the President of March 6, 1933, the Executive Order of March 10, 1933, and Regulation #10 of the Secretary of the Treasury.

50. The said Court erred in failing to make the conclusion of law that the payments of deposits between March 28, 1933 and January 23, 1934 to the City of Yonkers by the Conservator and successor Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the Proclamation of the President of March 6, 1933, the Executive Order of March 10, 1933, and Regulation #10 of the Secretary of the Treasury.

51. The said Court erred in failing to make the conclusion of law that the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as security for the indebtedness.

52. The said Court erred in failing to make the conclusion of law that the City of Yonkers had a good, valid and

subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with said City as security for the deposits of said City.

53. The said Court erred in failing to make the conclusion of law that this action was not commenced within the time limited by law.

54. The said Court erred in failing to make the conclusion of law that the City of Yonkers is prohibited by law from paying the claim alleged in the complaint.

635

55. The said Court erred in failing to make the concluclusion of law that the City of Yonkers is prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the plaintiff, and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the comptroller, and shall have been audited and allowed by him.

56. The said Court erred in failing to make the conclusion of law that the City of Yonkers is not liable in a civil action for damages or injuries to person or property, or
636 invasion of personal or property rights, of any name or nature whatsoever, arising at law or in equity, alleged to have been caused or sustained by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the City, or of its agents, officers or employees, unless a claim therefor in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, pledge or neglect out of which or on account of which the claim arose, be presented to the Common Council and served upon the Mayor or City Clerk and notice of intention to commence an action thereon be served

upon the Corporation Counsel, nor unless an action shall be commenced thereon within one year after the happening of such accident or injury or occurrence of such act, omission, fault or neglect.

57. The said Court erred in finding that The First National Bank and Trust Company was insolvent as of the 6th day of March, 1933, and that the rights of the general creditors of The First National Bank and Trust Company became fixed as of March 6, 1933.

638

58. The said Court erred in finding that all of the payments by the Conservator and the deposits aforesaid of the City of Yonkers were made with the view to the preference of the City of Yonkers over other creditors of The First National Bank and Trust Company.

59. The said Court erred in finding that the payments of such deposits by the Conservator of The First National Bank and Trust Company to the City of Yonkers were not "permitted" payments as allowed under the authority of the Proclamation of the President of March 6, 1933, the Executive Order of March 10, 1933, and Regulation #10 of the Secretary of the Treasury.

639

60. The said Court erred in finding that no service of any notice of claim or of intention to sue by The First National Bank and Trust Company, through its receiver, was required.

61. The said Court erred in finding that the payments aforesaid by The First National Bank and Trust Company to the City of Yonkers were voluntarily made under mistake of law by an officer of the Court and are recoverable.

640 *Assignments of Error and Prayer for Reversal.*

62. The said Court erred in finding that the plaintiff is entitled to recover of the defendant the sum of $138,551.88, with interest from April, 1936.

63. The said Court erred in finding that the plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $166,262.26 from May 1, 1936 to November 2, 1937, and interest at the same rate on the sum of $138,551.88 from November 3, 1937 to the date of the judgment.

64. The said Court erred in finding that the payments
641 by the bank prior to the appointment of the Conservator of the deposits of the City of Yonkers were made with the view to the preference of the City of Yonkers over other creditors of The First National Bank and Trust Company of Yonkers.

65. The said Court erred in finding that the payments by the bank prior to the appointment of the Conservator of such deposits were not "permitted" payments as allowed under the authority of the Proclamation of the President of March 6, 1933, the Executive Order of March 10, 1933 and Regulation #10 of the Secretary of the Treasury.

642

66. The said Court erred in finding that no statute of the State of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

67. The said Court erred in finding that no statute of the State of New York confers upon state banks the specific power to pledge assets to secure deposits of the City of Yonkers.

68. The said Court erred in finding that under the common law of the State of New York, as declared by its highest

court, state banks lack the power to pledge assets to secure deposits of political subdivisions of the state.

69. The said Court erred in finding that no applicable ordinance or local law of the City of Yonkers confers upon any bank the power to secure deposits of the City of Yonkers.

70. The said Court erred in overruling the defendant's objection to the introduction in evidence of Plaintiff's Exhibits 1 and 2. 644

71. The said Court erred in overruling the defendant's objection to the following:

"Q. Do you recall March 4, 1933? A. Yes.

Q. What day of the week was that? A. Saturday.

Q. Was the bank open for any kind of business on that day? A. No.

Mr. McAneny: I object to that on the ground that the witness is not qualified, not being an officer of the institution and not being otherwise qualified to answer that question, and that the question 645
calls for a conclusion of the witness, and that it is incompetent, irrelevant and immaterial, and the answer could not be binding on the defendant.

The Court: He can show what position he held.

Mr. Moore: He was assistant cashier on that day, in the employ of the bank.

The Court: He was an assistant cashier and did some work there?

Mr. Moore: Yes.

The Witness: Yes.

The Court: You can show where he was on March 4th.

646 *Assignments of Error and Prayer for Reversal.*

Q. Where were you on March 4th? A. In the bank.

Q. Was the bank open for any kind of business on that day?

Mr. McAneny: I object to the question as calling for a conclusion. He can state whether business was done and what business was done, if he has knowledge of it.

The Court: I assume this calls for his personal knowledge.

647 Mr. McAneny: And I object to it, your Honor, as the wording of the question is whether the bank was open for business. That calls for a legal conclusion.

Mr. Moore: It does not. He would know whether the bank is closed or whether the bank is open.

Mr. McAneny: I object.

The Court: I think it is a statement of fact. Objection overruled; exception to the defendant."

72. The said Court erred in overruling the defendant's
648 objection to the following:

"Q. Mr. Power, did the bank ever again open for regular business?

Mr. McAneny: I object to that upon the same ground, as calling for a conclusion. The witness is not qualified, and it does not ask for a statement of fact.

The Court: I do not know whether he has been employed there continuously since that time.

Mr. Moore: Yes, he said he had been employed by the bank and then by the conservators.

The Court: Overruled.
Mr. McAneny: Exception."

73. The said Court erred in denying the defendant's motion to dismiss the complaint made at the close of the plaintiff's case.

74. The said Court erred in denying the defendant's motion to dismiss the complaint made at the conclusion of the whole case.

WHEREFORE, said defendant-appellant respectfully prays:

1. That the judgment entered in said action be reversed.

2. That judgment be entered in favor of the defendant with costs in all courts.

3. That the lower court be directed to enter judgment in favor of the defendant with costs in all courts.

4. That said defendant-appellant have such other, further, or different relief as may be just.

Dated: October 28th, 1938.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for defendant-appellant.

652 **Citation.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

653 THE CITY OF YONKERS,
Defendant.

L. 64-51.

To Walter F. Downey, as Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, Appellee, and Benjamin W. Moore, his attorney,

GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit held at Federal Courthouse, in the Borough of Manhattan, City and State of New York, within thirty
654 days from the date hereof, pursuant to an appeal filed in the office of the United States District Court, Southern District of New York, at New York, N. Y., wherein the City of Yonkers is appellant and Walter F. Downey, as Receiver of the First National Bank and Trust Company of Yonkers, in liquidation is appellee, to show cause, if any there be, why the judgment entered herein on the 5th day of August, 1938, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable William Bondy, Judge of the District Court of the United States, sitting for the Southern District of New York, on this 31st day of October, 1938.

WM. BONDY,
U. S. D. J.

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,
against
THE CITY OF YONKERS,
Defendant.

L. 64-51.

To Charles Weiser, Clerk of the United States District Court, Southern District of New York:

Sir:

Notice is hereby given that The City of Yonkers, defendant above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on August 5, 1938.

Dated, New York, N. Y., October 31, 1938.

LEONARD G. MCANENY,
Corporation Counsel, Attorney for Defendant,
Office & P. O. Address,
City Hall,
Yonkers, New York.

658

Stipulation and Order Extending Time to File Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

659

against

THE CITY OF YONKERS,
Defendant.

L. 64-51.

WHEREAS, an appeal was allowed the defendant herein on the 31st day of October, 1938, and

WHEREAS, the time of the said defendant to docket this case and file the transcript of record on appeal herein with the Clerk of the United States Circuit Court of Appeals for the Second Circuit will expire on November 30, 1938, now therefore,

660

IT IS STIPULATED AND AGREED, by and between the parties hereto that the time of the defendant to docket this case and file the transcript of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December

15, 1938 and an order to this effect may be entered by either party without notice.

Dated: Yonkers, New York, November 23, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendant.

662

On reading and filing the foregoing stipulation, it is

ORDERED, that the time of the defendant to docket the above entitled case and file the transcript of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938.

Dated: New York, N. Y., November 23, 1938.

CHARLES WEISER,
Clerk, U. S. District Court,
Southern District of New York.

663

664

Stipulation and Order Settling Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

665

THE CITY OF YONKERS,
Defendant.

L. 64-51.

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true copy of the transcript of the record of the District Court in the above entitled matter as agreed upon by the parties.

Dated: Yonkers, New York, November 29, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

666

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendant.

On reading the foregoing stipulation, it is

ORDERED, that the foregoing printed record be filed in lieu of the original appeal papers for the purpose of certifying a record on appeal.

Dated: New York, N. Y., December 3rd, 1938.

VINCENT L. LEIBELL,
U. S. D. J.

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Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,
against
THE CITY OF YONKERS,
Defendant.

L. 64-51.

668

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the printed transcript of the record of the said District Court in the above entitled matter.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York this 5th day of December, in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundredth and sixty-third year.

669

CHARLES WEISER,
Clerk.

(SEAL)

670

Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
THE CITY OF YONKERS,
Defendant-Appellant.
No. 230.

671

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,
Defendants-Appellants.
No. 231.

672

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants-Appellants.
No. 232.

Opinion.

673

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders of "The Saunders Trade School Fund",
Defendant-Appellant.
No. 233.

674

Before:

L. HAND, AUGUSTUS N. HAND and CHASE,
Circuit Judges.

Appeals from the United States District Court for the Southern District of New York.

From judgments in the several actions above-named that the Receiver of the First National Bank & Trust Company of Yonkers in Liquidation recover of the respective defendants therein fifty per cent. of certain moneys paid out by the Bank between March 8, 1933 and January 23, 1934, inclusive, on checks drawn on behalf of the various defendants, the latter appeal. Affirmed. 675

LEONARD G. MCANENY, Corporation Counsel, for Defendants-Appellants; LEONARD G. MCANENY, E. J. DIMOCK, MORRIS L. ROSENWASSER, J. DONALD RAWLINGS and HAROLD T. GARRITY, Counsel.

BENJAMIN W. MOORE, Attorney for Plaintiff-Appellee; BENJAMIN W. MOORE and MILTON L. ROMM, Counsel.

676 *Opinion.*

AUGUSTUS N. HAND, Circuit Judge:

The legal principles applicable to Action No. 230 against the City of Yonkers are determinative of the issues in the other three cases which need not, therefore, be separately discussed.

This is an action by the receiver of The First National Bank & Trust Company of Yonkers (herein called the Bank) against The City of Yonkers (herein called the City) to recover fifty per cent. of certain money paid out
677 by the Bank, between March 8, 1933, and January 23, 1934, inclusive, on the checks of the City. Since September 30, 1929, the Bank has been a national banking corporation organized and existing under the laws of the United States and the City a municipal corporation organized and existing by virtue of the laws of the State of New York.

On March 4, 1933 the City had funds on deposit in checking accounts in the Bank as follows:

(1) Treasurer of the City	$275,105.53
(2) City of Yonkers	1,502.84
678 (3) Nepperhan Sewer Fund of City of Yonkers	621.88

On March 4, 1933, the Governor of the State of New York proclaimed a bank holiday, and on March 6, 1933, the President of the United States proclaimed a bank holiday which was extended by further proclamation on March 9, 1933 and ratified by Congress on the latter date. The Bank never reopened for regular business after March 4, 1933 but operated under restrictions imposed by the Secretary of the Treasury until a Conservator was appointed. On March 30, 1933 the Comptroller of the Currency appointed a Conservator of the Bank and on Janu-

ary 23, 1934, appointed a receiver in liquidation. A dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 3, 1937.

On March 4, 1933, the City held various bonds having a par value of $535,000 which had been delivered to it by the Bank as security for the above three accounts, among others. These bonds, to the amount at par of $534,000, were later returned in connection with withdrawals from the accounts.

By a series of withdrawals beginning on March 8, 1933 680
and ending on January 23, 1934, the City withdrew almost all of the balance in each of the three accounts as follows:

1. Account with Treasurer of City		$275,105.53
Withdrawals:		
March 8 to March 19	$ 89,226.06	
March 20 to March 27	67,735.99	
March 28 on	118,016.99	
Total		274,979.04
		681
2. Account with City of Yonkers		$ 1,502.84
Withdrawals:		
May 23 to July 21, 1933		1,502.84
3. Account with Sewer Fund		$ 621.88
Withdrawals:		
May 4, 1933		621.88

The complainant seeks to recover fifty per cent. of the above withdrawals on the ground that they constituted an unlawful preference within Sections 91 and 194, U. S. C. A., of the National Bank Act.

If the pledge of bonds to secure the deposits was authorized by the National Bank Act it is clear that the City had a valid lien on the bonds to the extent of its deposits and this action by the receiver must fail. *Lewis* v. *Fidelity Deposit*, 292 U. S. 559; *McNair* v. *Knott*, 302 U. S. 369. It is likewise settled that national banks have no
683 implied power to pledge assets to secure either private or public deposits, *Texas & Pac.* v. *Pottorff*, 291 U. S. 245; *Marion* v. *Sneeden*, 291 U. S. 262. Express authority for the pledge made in this case depends upon whether the requirements of the Act of June 25, 1930, 12 U. S. C. A., 90, have been met. That section provides that:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of
684 other banking institutions in the State."

The purpose of the Act of June 25, 1930 was to equalize the positions of national and state banks in competing for deposits, and is in line with a long series of acts, beginning in 1864, designed to apply the policy of equalization. *Lewis* v. *Fidelity Co.*, 292 U. S. 559, at 564-65.

It is conceded that there was no express statutory authority in New York authorizing state banks to give security for these deposits during the times involved. In the absence of express enabling statutes state banks in New York are not authorized to pledge assets to secure either private or public deposits, and it is the duty of the

Superintendent of Banks to compel them to recover any assets so pledged upon the return of the deposits when demanded. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, at 187-88. As was said by Judge Finch in his opinion in *City of Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, 406: "No question remains that this pledge by the defendant securing the deposit (of public money) was *ultra vires* as to both parties." So far as the Act of June 25, 1930 may be thought to require an authorization of state banks to make pledges as a prerequisite for pledges by national banks it does not apply here.

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But the law of New York is that pledges by state banks to secure deposits, even though *ultra vires*, may not be set aside until the deposits have been repaid in full, whether or not insolvency has intervened. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175; *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400. The parties concede that the law of New York with respect to the effect of an *ultra vires* pledge does not bring the pledges here within the Act of June 25, 1930. The policy of the statute would appear to lead to the same conclusion. The Act was designed to equalize competition for public deposits and it does not appear to give national banks authority to do what the state banks are forbidden to do and what the State Superintendent of Banks is under a duty to undo. The banks of the State could not give security in a case like this without violating their charters; Congress could not have intended to meet that type of competition. The use of the term "authorized" in the Act accords with this view; a pledge which is "*ultra vires*" cannot be said to be "authorized".

687

The City argues, however, that the pledge made by the national bank in this case, even though not authorized and outside the scope of its charter powers, should be given the same effect as State law gives to similar pledges by State banks. Such a result would be contrary to the result reached in *Texas & Pac. Ry.* v. *Pottorff*, 291 U. S. 245, and

Marion v. *Sneeden*, 291 U. S. 262, in which the Court held that a national bank might recover assets which had been pledged to secure deposits even though the depositor would not be paid in full because of supervening insolvency of the bank.

The City says that these decisions are not controlling because in neither did it appear that the law of the State where the transaction occurred gave any different effect to an *ultra vires* pledge by a bank than that given under the federal law. Nevertheless both decisions make it plain, 689 that, unless the right to pledge is expressly granted by a federal statute, a pledge to secure deposits in national banks is wholly unauthorized and, as Justice Brandeis said in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 255: "To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets. • • • This policy of equal treatment was held to preclude, in case of a national bank, even the preference under §3466 of the Revised Statutes which otherwise is accorded to the United States wher its debtor becomes insolvent. *Cook County National Bank* v. *United States*, 107 U. S. 445. The effect 690 of a pledge is to withdraw for the benefit of one depositor part of the fund to which all look for protection."

It is true that in spite of the foregoing general policy of the Act, Congress has seen fit to permit national banks to give security to depositors "of the same kind as is authorized by the law of the State", but it seems unreasonable to suppose that the general policy of the National Bank Act to prevent preferences is to be so limited as to permit hypothecations of assets that do not strictly fall within the statutory exceptions to a sound general rule requiring equal distribution of the assets of insolvent banks among all depositors. As we have already said the words

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"authorized by the law of the State" plainly relate to the authority of state banks under their charters and not to the effect to be given to their *ultra vires* acts. Under the law of New York, as it existed at the time the Bank became insolvent, there can be no doubt that the pledges were unauthorized. In *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, and *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, the Court of Appeals held that enforcement of the law prohibiting pledges to secure deposits lay with the State Superintendent of Banks who, under his statutory powers, should be alert to prevent such pledges and to undo them prior to the occurrence of insolvency. The Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, evidently felt that the supervisory power of the Comptroller of the Currency was not enough to insure adequate enforcement of the policy to prevent pledges but that they should be treated by the courts as wholly void. The question of the right of a national bank to pledge its assets to secure depositors and the effect to be given to such a pledge when once made are both clearly matters of national concern. The rule in some of the states (including New York) that a bank is estopped to rescind a pledge to a depositor until he is paid in full is directly in the face of the policy attributed to the National Bank Act in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262. In this connection see *Merchants' National Bank* v. *Wehrmann*, 202 U. S. 295; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 372; *California Bank* v. *Kennedy*, 167 U. S. 362.

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The rationale of the two cases cited from the New York Court of Appeals appears to be that a banking corporation organized under the laws of the State has certain actual powers outside the powers authorized by its charter and that its exercise of such *ultra vires* powers may create an estoppel not only against the corporation itself but also

against its general creditors. The measure of the powers of a national bank, on the other hand, is the statutory grant and powers not conferred by Congress are denied. The Act under which national banks are organized constitutes a complete system for their government. *Cook County Nat. Bank* v. *United States*, 107 U. S. 445, 448; *California Bank* v. *Kennedy*, 167 U. S. 362. The decision of the Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 260-61, is based upon a holding that a national bank cannot exercise powers not granted so as to erect an
695 estoppel against the general creditors for whose benefit the limitation of powers was imposed. See *Concord First National Bank* v. *Hawkins*, 174 U. S. 364. If the problem here be viewed as depending upon the powers which a national bank can exercise it seems clear that the extent of its powers must be determined by an interpretation of the federal statute in the light of the policy therein expressed and that views of state courts on the powers of local corporations have no relevance except as Congress expressly makes them applicable. For the foregoing reasons the plaintiff receiver who represents the general creditors is not estopped to set aside the pledge that was made in this case.

696 The holding in *Willing* v. *Binenstock*, 302 U. S. 272, and *Scott* v. *Armstrong*, 146 U. S. 499, 510, that a setoff, allowed under the common law of a State to an insolvent bank is not objectionable as a preference, does not militate against avoiding the pledges here. The transactions in those cases were ones which the banks were authorized to make and the state law was followed because it did not conflict with the policy of the Bank Act. It is one thing to sanction a general rule of law which allows a depositor to set off his deposit against his indebtedness, it is another thing to sanction a preference based on a transaction forbidden by the Act.

While a national bank in some cases may be under a duty to return benefits it has received as the result of an *ultra vires* transaction (see *First National Bank* v. *Mott Iron Works*, 258 U. S. 240; *Citizens National Bank* v. *Appleton*, 216 U. S. 196), the rule if applicable here would not help the defendant since it would not be entitled to a preference against the other depositors of the insolvent bank in the absence of tracing a specific *res*. *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 261; *cf. Rankin* v. *Emigh*, 218 U. S. 27. It is well settled that the distribution of the assets of an insolvent national bank is governed by federal law and that state laws which attempt to create preferences which arise at the time of insolvency are to be disregarded. *Old Company's Lehigh, Inc.* v. *Meeker*, 294 U. S. 227; *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216; *Davis* v. *Elmire Savings Bank*, 161 U. S. 275. 698

The City claims that the payments to it prior to the Conservatorship were not made "after the commission of an act of insolvency, or in contemplation thereof * * * with a view to the preference of one creditor to another * * *". The Bank was closed from March 4, 1933 to March 6, 1933 under proclamations by the Governor of New York and the President of the United States. Later it was permitted to operate under restrictions imposed by the Secretary of the Treasury. On March 20 a Conservator was appointed with the powers of a receiver as provided in 12 U. S. C. A., §203. On January 23, 1934, the Comptroller of the Currency on a finding of insolvency appointed a receiver. The Bank never opened for regular business after March 4, 1933. No attempt was made by the appellants to show any change in the Bank's condition after March 4, 1933. We hold that the facts indicated that the Bank would not be able to pay its depositors in due course and the trial court could properly draw the inference that the pay- 699

700 *Opinion.*

ments were in violation of 12 U. S. C. A., §91. See *Dehne* v. *Mine Safety Appliance Co.*, 94 F. (2d) 956 (C. C. A. 3); *cf. Kullman* v. *Wooley*, 83 F. (2d) 129 (C. C. A. 5); *Willing* v. *Eveloff*, 94 F. (2d) 344 (C. C. A. 3); *Hardee* v. *Washington Loan & Trust Co.*, 91 F. (2d) 314 (App. D. C.).

The payments made by the Conservator were recoverable on still another theory because made out of the assets of an insolvent under a mistake of law. *LaParr* v. *City of Rockford, Ill.*, 100 F. (2d) 564 (C. C. A. 7); *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 152 (App. D. C.), aff'd. 297 U. S.
701 383. For the foregoing reasons the judgments in the four cases on appeal are affirmed.

702

703

Order for Mandate.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of August, one thousand nine hundred and thirty-nine.

Present:

704

Hon. LEARNED HAND,
Hon. AUGUSTUS N. HAND,
Hon. HARRIE B. CHASE,
Circuit Judges.

WALTER F. DOWNEY, Receiver, etc.,
Plaintiff-Appellee,

vs.

THE CITY OF YONKERS,
Defendant-Appellant.

No. 230.

705

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

IT IS FURTHER ORDERED that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver, etc.,

vs.

CITY OF YONKERS.

ORDER FOR MANDATE.

United States Circuit of Appeals,
Second Circuit,
Filed Aug. 22, 1939,
D. E. ROBERTS, Clerk.

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 236, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

WALTER F. DOWNEY, Receiver, etc.,

Plaintiff-Appellee,

against

THE CITY OF YONKERS,

Defendant-Appellant.

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighteenth day of September, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-fourth.

[SEAL]

D. E. ROBERTS,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 543

JOHN J. CONDON, MAYOR, GUSTAV W. KLEIN, JR., FIRST DEPUTY AND ACTING COMPTROLLER, AND RAYMOND J. WHITNEY, CITY MANAGER, ETC., PETITIONERS,

vs.

WALTER F. DOWNEY, RECEIVER OF THE FIRST NATIONAL BANK AND TRUST COMPANY OF YONKERS, IN LIQUIDATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1939.

CERTIORARI GRANTED DECEMBER 18, 1939.

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TESTIMONY.

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John B. Power,
Direct 34
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Carl H. Vanvick,
Direct 39
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Stephen A. Roake,
Direct 53
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Gustav W. Klein, Jr.,
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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

Statement Under Rule 13.

This is an appeal by the defendants above named, from a judgment made and entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 5th day of August, 1938, in the above entitled case, in favor of the plaintiff, Walter F. Downey, Receiver of The First National Bank and Trust Company, in liquidation, against the defendants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, in the sum of

4 *Statement Under Rule 13.*

$14,641.84, together with interest thereon in the sum of $2,255.73 and costs in the sum of $72.85.

This action was commenced on February 7, 1936, by the original plaintiff herein, Arthur E. Muth, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, by the filing of a praecipe and the issuance of a summons. The summons and complaint, with proof of service, were filed on February 13, 1936. The defendants filed an answer on March 24, 1936, which was amended by stipulation dated November 24, 1937. Walter E. Downey,
5 having been appointed Receiver of the First National Bank and Trust Company in the place of Arthur E. Muth, on November 15, 1937, he was by an order dated November 26, 1937, substituted as plaintiff in the place and stead of Arthur E. Muth.

On January 4 and 5, 1938, this case was tried before Judge John Knight without a jury, a jury having been waived by stipulation on the record. Judge Knight reserved decision.

On June 8, 1938, Judge Knight rendered his decision in favor of the plaintiff.

On July 18, 1938, findings of fact and conclusions of
6 law as requested by the plaintiff, were signed by Judge Knight and on the same day, Judge Knight signed a memorandum containing his rulings upon the defendants' requests for findings of fact and conclusions of law. The findings and memorandum were filed on or about July 29, 1938.

On August 3, 1938, costs were taxed in the sum of $72.85 and on August 5, 1938, judgment was entered by the plaintiff against the defendants in the sum of $14,641.84, together with interest thereon in the sum of $2,255.73.

Thereafter defendants made a motion to determine the applicability of the new Rules of Civil Procedure for guidance on the appeal herein. Judge Knight determined under

Rule 86 that the application of the new rules would not be feasible and would work injustice in this case. Accordingly the former procedure has been followed herein except that in addition appeal was taken under the new procedure out of abundant caution.

On October 31, 1938, an appeal was allowed defendants from the said judgment of August 5, 1938.

There was no arrest, attachment or reference herein.

Plaintiff has appeared throughout the proceedings in the above entitled action by Benjamin W. Moore, Esq., and the defendants have appeared by Leonard G. McAneny, Esq., Corporation Counsel of the City of Yonkers.

Docket Entries.

Date	Matter
Feb. 7, 1936	Filed praecipe and issued summons.
Feb. 13, 1936	Filed summons and complaint and affidavit of service.
Mar. 24, 1936	Filed stipulation extending time to answer to 3/28/36.
Mar. 24, 1936	Filed answer of defendants.
Nov. 20, 1937	Filed note of issue, motion to substitute party plaintiff, returnable 11/26/37.
Nov. 26, 1937	Filed affidavit and notice of motion to substitute Receiver as plaintiff—no opposition.
Nov. 26, 1937	Motion granted—Mandelbaum, J.
Nov. 26, 1937	Filed order substituting Receiver as party plaintiff—Mandelbaum, J.
Jan. 4, 1938	Before Knight—trial begun, jury waived by stipulation.

10 *Docket Entries.*

Jan. 5, 1938	Before Knight—trial continued—dismiss motion reserved—denied, exception.
June 13, 1938	Filed opinion #11,467. Plaintiff to recover $14,641.81.
July 29, 1938	Filed findings of fact and conclusions of law—Knight, J.
July 29, 1938	Filed defendants' requests for findings of fact and conclusions of law.
July 29, 1938	Filed opinion #11,598 on defendants' requests for findings of fact and conclusions of law—Knight, J.
11	
Aug. 3, 1938	Filed bill of costs taxed at $72.85.
Aug. 5, 1938	Filed stipulation that defendants' answer be deemed amended, etc.
Aug. 5, 1938	Filed judgment #38,411 for plaintiff for $16,970.42.
Sept. 26, 1938	Filed note of issue, motion to determine civil rules 46 and 37, returnable 10/4/38.
Oct. 22, 1938	Filed affidt. and notice of motion to determine Civ. Rules 46 and 73.
12	
Oct. 22, 1938	Filed affidt. in opposition to motion to determine Civ. Rules 46 and 73.
Oct. 22, 1938	Filed order denying motion to determine Civ. Rules 46 and 73.
Oct. 28, 1938	Filed order extending time to file bill of exceptions to 1/7/39—Conger, J.
Oct. 29, 1938	Filed exceptions—Knight, J.
Oct. 31, 1938	Filed petition and order allowing appeal—Bondy, J.
Oct. 31, 1938	Filed Assignment of Errors.
Oct. 31, 1938	Filed cost bond on appeal—Great American Indemnity Co.

Summons. 13

Nov. 1, 1938 Filed notice of appeal and mailed copy to Benjamin W. Moore, 11/2/38.

Nov. 3, 1938 Filed Citation—Ret. 30 days.

Nov. 22, 1938 Filed Bill of Exceptions and settlement of same (Knight).

Summons.

UNITED STATES DISTRICT COURT, 14

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants. 15

L 63—Page 189.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the

complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 7th day of February, A. D. 1936

17

CHARLES WEISER,
Clerk.

(SEAL)

BENJAMIN W. MOORE,
Plaintiff's Attorney.
Office and Post Office Address:
30 So. Broadway, Yonkers,
State of New York.

18

19

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

20

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

21

Plaintiff complaining of the defendants, by his attorney, Benjamin W. Moore, alleges:

First.—That at all times since the 30th day of September, 1929 the First National Bank and Trust Company of Yonkers has been a national banking corporation organized and existing under the laws of the United States with its principal place of business in the City of Yonkers, County of Westchester and State of New York.

Second.—That the defendants Joseph F. Loehr, James J. Hushion and Dennis M. Morrissey are, respectively, the

22 *Complaint.*

Mayor, Comptroller and Commissioner of Public Safety of the City of Yonkers, New York, and have since the 1st day of January, 1932 together constituted the Board of Trustees of the Police Pension Fund of said City of Yonkers having the care, control and management of said fund by virtue of the provisions of Local Law No. 1 of said City of Yonkers duly enacted during the year 1931.

Third.—That on the 20th day of March, 1933 the Comptroller of the Currency of the United States acting under and pursuant to the Bank Conservation Act enacted by
23 the Congress of the United States on March 9, 1933 duly appointed Percival W. Trudeau as Conservator of said First National Bank and Trust Company of Yonkers, and said Conservator, under the direction of said Comptroller, on said March 20, 1933, duly took possession of the books, records and assets of every description of said First National Bank and Trust Company of Yonkers and continued to act as such Conservator until July 24, 1933: that Louis D. Rossire was on said July 24, 1933, by like authority, duly appointed by said Comptroller of the Currency as successor Conservator of said First National Bank and Trust Company of Yonkers in the place and stead of said Percival
24 W. Trudeau; and that said Louis D. Rossire duly qualified as such Conservator and continued to act as such until the 23rd day of January, 1934: that the said Comptroller of the Currency had become satisfied of the insolvency of said First National Bank and Trust Company of Yonkers and that the plaintiff was on that day duly appointed by said Comptroller of the Currency as Receiver of the said First National Bank and Trust Company of Yonkers to liquidate said bank, and that the plaintiff has duly qualified and is now acting as such Receiver.

Fourth.—Upon information and belief that from the said 30th day of September, 1929 the defendants and their

predecessors in office have, by virtue of authority vested in them, maintained a deposit account in said bank under the caption "Police Pension Fund" and on the said 20th day of March, 1933 the credit balance of said deposit account, together with accrued interest computed to the said 20th day of March, 1933, amounted to the sum of Twenty-Eight Thousand Seven Hundred Seventeen ($28,717) Dollars.

Fifth.—That a pension fund for the policemen of said City of Yonkers was created and established pursuant to the provisions of Chapter 158 of the Laws of the State of New York for the year 1881.

Sixth.—That from the time of the creation and establishment of the said pension fund to and including the 18th day of April, 1900 the provisions of the law with regard to the sources of said fund were in substance as follows:

1. The widows and orphans' fund in the possession of the board of police commissioners of the city of Yonkers on April 30, 1881.

2. All fines imposed by the board of police upon members of the police force.

3. All rewards, fees, gifts, testimonials and emoluments that may be presented, paid or given to any member of the police force for account of police services, except such as shall be allowed by the board of police to be retained by said member.

4. All lost or stolen money remaining in the hands of the board of police for the space of one year, and for which there shall be no lawful claimant, and moneys arising from the sale of unclaimed property, which the board of police are hereby authorized to sell after said property shall have been without a lawful claimant for the space of one year.

5. A sum of money equal to one day's pay per month, or any fractional part of a day for each member of the police force having lost time, to be paid monthly by the treasurer of the board of police commissioners to the treasurer of the board of trustees of the police pension fund from moneys deducted from the pay of members of said force on account of lost time.

6. Two per centum of the salary of each of the members of said police force, who may, by their consent in writing, to be filed with the board of trustees of the police
29 pension fund, consent to its being taken for the police pension fund.

7. All fees received and paid for the sealing and examining of weights and measures by the police as shall be provided by the laws and ordinances of said city. Also all fees received and paid for the inspection and testing of combustible and dangerous materials by the police, as shall be provided by the laws and ordinances of said city.

Seventh.—That from the 19th day of April, 1900 to and including the 20th day of May, 1908 the provisions of the law with regard to the sources of said fund were in sub-
30 stance as follows:

1. The capital, interest, income, dividends, cash deposits, securities and credits formerly belonging to the police pension fund, as created by chapter one hundred and fifty-eight of the laws of eighteen hundred and eighty-one, and the various acts amendatory thereof existing at the time of the passage of this act, with the additions thereto from time to time.

2. All fines imposed by the board of police upon members of the police force.

3. All rewards, fees, gifts, testimonials and emoluments that may be presented, paid or given to any member of

the police force for account of police service, except such as shall be allowed by the board of police to be retained by said member.

4. All lost or stolen money remaining in the hands of the board of police for the space of one year, and for which there shall be no lawful claimant; and the moneys arising from the sale of unclaimed property which the board of police are hereby authorized to sell after said property shall have been without a lawful claimant for the space of one year.

5. A sum of money equal to one day's pay per month or any fractional part of a day for each member of the police force having lost time, to be paid monthly by the treasurer of the board of police commissions to the treasurer of the trustees of the police pension fund from moneys deducted from the pay of members of said police force on account of lost time.

6. All fees received and paid for the sealing and examining of weights and measures by the police, as shall be provided by the laws and ordinances of said city; also all fees received and paid for the inspection and testing of combustible and dangerous materials by the police, as shall be provided by the laws and ordinances of said city.

7. A sum of money equal to but not greater than two per centum of the monthly pay, salary or compensation of each member of the police force, which sum shall be deducted monthly by the treasurer of the police board from the pay, salary or compensation of each and every member of the police force.

8. A sum of money annually equal to but not greater than ten per centum of all excise moneys, after deducting rebates or returns, received by the city of Yonkers from or on account of the granting of licenses or permission to

34 *Complaint.*

sell strong or spirituous liquors, ale, wine or beer, and of any moneys paid for taxes upon the business of trafficking in or selling or delivering any strong or spirituous liquors, ale, wine or beer.

Eighth.—That from the 21st day of May, 1908 to and including the 22nd day of November, 1931 the provisions of the law with regard to the sources of the said fund were in substance as follows:

1. All fines imposed by the Commissioner of Public
35 Safety on the members of the Police Department in the City of Yonkers.

2. All rewards, money, gifts, testimonials and emoluments that may be paid or given to any member of the Police Department, for account of police service, except such payments or gifts as have been or shall be allowed by the Commissioner of Public Safety to be retained by the member receiving the same.

3. All moneys, pay, compensation or salary, or any part thereof deducted or withheld from any member or members of the Police Department, for or on account of absence or suspension from duty, except in cases of sickness.
36

4. All lost or stolen money remaining in the hands of the Police Force for the period of one year, and for which there shall be no lawful claimant: and the moneys arising from the sale of unclaimed property, which property the Commissioner of Public Safety is hereby authorized to sell, after it shall have been without a lawful claimant for the period of one year.

5. All fees received and paid for the inspection and testing by the police of combustible and dangerous materials, as shall be provided by the laws and ordinances of the city.

6. All moneys which shall be deducted from the monthly pay, salary or compensation of each member of said department, and which shall be the sum of two per centum of the monthly pay, salary or compensation of each of the said members; which said sum shall be deducted monthly by the Comptroller of the City of Yonkers from the pay, salary or compensation of each and every member of said Police Department.

7. Ten per centum annually of the excise moneys to which the City of Yonkers may be entitled, by virtue of the provisions of the liquor tax law of the State of New York, which percentage of such moneys must be annually deducted therefrom and paid forthwith to the trustees of the police pension fund.

Ninth.—That from the 23rd day of November, 1931 to and including the 20th day of March, 1933 the provisions of the law with regard to the sources of the said fund were in substance as follows:

1. All fines imposed by the commissioner of public safety on the members of the police department in the city of Yonkers.

2. All rewards, money, gifts, testimonials and emoluments that may be paid or given to any member of the police department for account of police service, except such payments or gifts as have been or shall be allowed by the commissioner of public safety to be retained by the members receiving the same.

3. All money, pay, compensation or salary or any part thereof deducted or withheld from any member or members of the police department, for or on account of absence or suspension from duty except in cases of sickness.

40 *Complaint.*

4. All lost or stolen money remaining in the hands of the police for the period of one year and for which there shall be no lawful claimant; and the moneys arising from the sale of unclaimed property, which property the commissioner of public safety is hereby authorized to sell, after it shall have been without a lawful claimant for the period of one year.

5. All fees received and paid for the inspection and testing by the police of combustibles and dangerous material, as shall be provided by the laws and ordinances of the
41 city.

6. All moneys which shall be deducted from the monthly pay, salary or compensation of each member of said department and which shall be the sum of two per centum of the monthly pay, salary or compensation of each of the said members; which said sum shall be deducted monthly by the comptroller of the city of Yonkers from the pay, salary or compensation of each and every member of said police department.

7. An amount payable to the trustees of the police pension fund out of the city treasury at the end of each fiscal
42 year equivalent to one and one-half times the amount of moneys deducted from the monthly pay, salary or compensation of each member of said police department during such year.

Tenth.—That at all the times herein mentioned the purpose and nature of said fund, as provided by law, was to provide for the payment of pensions to duly retired members of the police department of the City of Yonkers, their widows, children, or next of kin, and in addition thereto, since said 23rd day of November, 1931, to provide for the payment of premiums on group life insurance policies covering the lives of members of said police department.

Eleventh.—Upon information and belief that the money maintained as aforesaid on deposit with said bank was not public money of the State of New York or of any of its political subdivisions. 43

Twelfth.—Upon information and belief that from the said 30th day of September, 1929, and on divers dates during the existence of said deposit account, maintained as aforesaid by the defendants and their predecessors, said First National Bank and Trust Company of Yonkers pledged with and to the said City of Yonkers, as security for the repayment of the indebtedness evidenced by said deposit account and as security for the repayment of the indebtednesses evidenced by certain other deposit accounts, certain of the assets of said bank consisting of various and sundry bonds, a schedule of which is attached hereto, marked Exhibit A, and made a part of this complaint, and that the pledge of assets so made to secure the repayment of the indebtedness evidence by the deposit account maintained as aforesaid by the defendants and their predecessors was unlawful, illegal, null and void. 44

Thirteenth.—Upon information and belief that on divers dates from the said 20th day of March, 1933 to or about the 16th day of December, 1933 the said Conservator and the said successor Conservator recovered from the said City of Yonkers all of the aforesaid assets so pledged with the said City by payments on account of all the aforesaid deposit accounts and on the 26th day of October, 1933 the deposit account maintained as aforesaid by the defendants stood paid out in full. 45

Fourteenth.—That under date of December 16, 1933 there was made available to all creditors of the said bank a first dividend of 40% of the amount of their deposits at the time of the bank's suspension.

46 *Complaint.*

Fifteenth.—That the said payments referred to in paragraph marked "Thirteenth" of this complaint on account of the deposit account maintained by the defendants as aforesaid were not ratable with and proportionate to the said dividend made available to the other creditors of the said bank and were illegal, null and void.

Sixteenth.—That there is now justly due and owing from the defendants to the plaintiff the sum of Seventeen Thousand Two Hundred Thirty and 20/100 ($17,230,20) Dollars representing the difference between the said 40% 47 dividend and the said payments of Twenty-Eight Thousand Seven Hundred Seventeen ($28,717) Dollars.

Seventeenth.—That no part of said sum has been paid although payment thereof has been duly demanded.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of Seventeen Thousand Two Hundred Thirty and 20/100 ($17,230.20) Dollars, with interest thereon from the 26th day of October, 1933, besides the costs and disbursements of this action.

48 BENJAMIN W. MOORE,
Attorney for Plaintiff,
Office & P. O. Address,
30 South Broadway,
Yonkers, New York.

Schedule A, Attached to Complaint.

Description of Assets Pledged	Face Value
Fourth 4¼ Liberty Loan Bonds	$ 40,000.00
Town of Cortland, New York	37,000.00
City of New York, Corp. Stock	10,000.00
Town of Tonawanda, Sewer Bonds	45,000.00
City of Yonkers, School Bonds	10,000.00
United States Fourth Liberty Loan Bonds, 4¼%	15,000.00
State of Arkansas, 4½s, due 1942	50,000.00
Butte, Montana, 6s, due 1941	15,000.00
Charlotte, North Carolina, 4½s, due 1934	5,000.00
Galveston, Texas, 5s, due 1933-1935	12,000.00
Town of Greenburgh, New York, 4½s, due 1946	15,000.00
Town of Greenburgh, New York, 4½s, due 1953	5,000.00
Town of Greenburgh, New York, 4½s, due 1954	1,000.00
Town of Huntington, Long Island, 4½s, due 1938	2,000.00
Town of Huntington, Long Island, 4½s, due 1945	2,000.00
Town of Huntington, Long Island, 4½s, due 1946	7,000.00
County of Jefferson, Alabama, 5s, due 1947	15,000.00
State of Louisiana, 4¾s, 1973	10,000.00
State of Louisiana, 4½s, 1953	5,000.00
New Orleans, 4½s, due 1956	5,000.00
City of New York, 4½s, due 1965	10,000.00
Norfolk, Virginia, 4½s, due 1935	10,000.00
Norfolk, Virginia, 4½s, due 1935	15,000.00
State of Oregon, 5½s, due 1937	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1938	2,500.00

52 *Schedule A, Attached to Complaint.*

State of Oregon, 5½s, due 1945	$ 2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1946	2,500.00
City of Orlando, Florida, 5½s, due 1952	25,000.00
Portsmouth, Virginia, 5s, due 1954	10,000.00
City and County of San Francisco, 5s, due 1945	10,000.00
Village of Sea Cliff, New York, 5s, due 1933	1,000.00
State of South Dakota, 5s, due 1938	15,000.00
Winston-Salem, North Carolina, 4¾s, due 1936	14,000.00
53 Canadian, Int. Paper, 6s, due 1949	25,000.00
Comm. of Kentucky, 4½s, due 1950	50,000.00
Town of Lyndhurst, 5½s, due 1934	55,000.00
State of New Mexico, 6s, due 1935	25,000.00
Bay City, 4s, due 1935	3,000.00
Seattle, Washington, 5s, due 1934	6,000.00
Seattle, Washington, 5s, 1940	2,000.00
Teaneck, New Jersey, 4½s, due 1934	25,000.00
Union, 6s, due 1934	25,000.00
Ohio Public Service, 6s, due 1953	30,000.00
South Bay Cons. Water Co., 5s, due 1950	10,000.00
54 Laclede Gas Light Co., 5½s, due 1935	5,000.00
Total Face Value	$692,000.00

(Duly verified by Arthur E. Muth on February 7, 1936.)

Answer as Amended by Stipulation, Dated November 24, 1937.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 53-189.

The defendants above named by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, for their answer to the plaintiff's complaint, respectfully show and allege:

First.—Deny each and every allegation of said complaint contained in paragraphs marked "Eleventh", "Fifteenth", "Sixteenth", and "Seventeenth".

Second.—Deny any knowledge or information sufficient to form a belief as to allegations contained in paragraph marked "Fourteenth".

58 *Answer as Amended by Stipulation, Dated November 24, 1937.*

Third.—Deny each and every allegation contained in paragraph marked "Fourth", except that on the 20th day of March, 1933 there was a credit balance of a certain deposit account, together with accrued interest in said bank amounting to the sum of Twenty-eight thousand seven hundred seventeen ($28,717.00) Dollars.

Fourth.—Deny each and every allegation of said complaint contained in paragraph marked "Seventh"; subdivisions 7 and 8. Admits that the sources of said funds
59 were set forth in Chapter 531 of the Laws of 1900 for New York State.

Fourth-A.—Denies each and every allegation in the paragraph of the complaint numbered "Thirteenth".

Fifth.—Deny each and every allegation contained in paragraph marked "Eighth", subdivisions 6 and 7, and admits that the sources of the fund from 1908 to 1931 were derived from Chapter 452 of the Laws of 1908 for New York State.

60 *Sixth.*—Deny each and every allegation of said complaint in paragraph marked "Ninth", subdivisions 6 and 7, and admits that sources of said fund from November 1931 to March 1933 were derived from Local Law number 1 of the laws of 1931, copy of which is hereto attached and marked "Defendants' Exhibit A".

Seventh.—Deny each and every allegtaion of said complaint contained in paragraph marked "Twelfth", except that the plaintiff, his predecessors, conservators, and the First National Bank and Trust Company, pledged certain securities with the City of Yonkers for said Police Pension

Answer as Amended by Stipulation, Dated November 24, 1937.

Fund account and other indebtedness of the City of Yonkers.

Eighth.—That upon information and belief that the exhibit "A" attached to the complaint is not a correct list of securities pledged with the City of Yonkers on or about the 4th day of March 1933, in that the following bonds were not in the possession of said City:

Fourth 4½ Liberty Loan Bonds	$40,000.00
Town of Cortland, New York	37,000.00
City of New York, Corp. Stock	10,000.00
Town of Tonawanda, Sewer Bonds	45,000.00
City of Yonkers, School Bonds	10,000.00
United States Fourth Liberty Loan Bonds, 4½%	15,000.00

As a First, Separate and Complete Defense Thereto, the Defendants Further Allege:

Ninth.—That the City of Yonkers is a municipal corporation organized under the laws of the State of New York, pursuant to Chapter 452 of the Laws of 1908.

Tenth.—That the City of Yonkers is a City of the Second Class, pursuant to Chapter 55 of the Laws of 1909 of New York State.

Eleventh.—That local law No. 1—1931 of the Local Laws for Cities in New York State superseded and amended previous laws in relation to the Police Pension Fund of the City of Yonkers. A copy of said Law is annexed hereto and made a part thereof and marked Exhibit "A".

64 *Answer as Amended by Stipulation, Dated November 24, 1937.*

Twelfth.—That upon information and belief that on or before the 4th day of March 1933, the First National Bank and Trust Company in Yonkers had the authority to pledge its assets to secure public money in the State of New York.

Thirteenth.—That prior to the 20th day of March 1933, the City of Yonkers maintained a general deposit account and numerous other accounts including the Police Pension Fund account in the First National Bank and Trust Company of Yonkers.

65

Fourteenth.—That prior to the 20th day of March 1933, the said First National Bank and Trust Company of Yonkers pledged certain securities with the City of Yonkers as security for the repayment of its deposits with said bank as more clearly shown by Plaintiff's Exhibit "A", except as hereinbefore denied.

Fifteenth.—That pursuant to Section 69 of the Second Class Cities Law, Chapter 55 of the Laws of 1909, and amendments thereto, the Board of Estimate and Apportionment had the authority to designate depositories for
66 the City of Yonkers, a copy of which section is attached hereto and made a part hereof, and marked Exhibit "B".

Sixteenth.—That on or about the 10th day of July, 1929 said Board of Estimate and Apportionment of the City of Yonkers designated the First National Bank of Yonkers and the Yonkers Trust Company and others as depositories and fixed the rate of interest to be received, including the Police Pension Fund, by the City Treasurer of Yonkers. A certified copy of said resolution is hereto attached and made a part hereof and marked Exhibit "C".

Answer as Amended by Stipulation, Dated November 24, 1937.

Seventeenth.—That upon information and belief that on or about the 30th day of September 1929, the Yonkers Trust Company and the First National Bank of Yonkers merged and said merger is filed in the office of the Register of Westchester County in Liber 10 of Miscellaneous Records.

Eighteenth.—That the Police Pension Fund of the City of Yonkers was a public fund of said City.

As a Second, Separate and Complete Defense Hereto, the Defendants Further Allege:

Nineteenth.—The allegations contained in said answer numbered "SIXTH" to "FIFTEENTH" inclusive, are herein re-alleged, with the same force and effect as if stated.

Twentieth.—That the defendants at no time as alleged in the said complaint maintained an account known as the Police Pension Fund in the plaintiff bank.

Twenty-first.—That the City Treasurer of the City of Yonkers maintained an account in the said bank designated as the Police Pension Fund of the City of Yonkers, prior to the 20th day of March 1933.

Twenty-second.—That the said First National Bank and Trust Company accepted said deposit designated as the Police Pension Fund of the City of Yonkers as public money of the City of Yonkers and pledged its security for the repayment of the same.

70 *Answer as Amended by Stipulation, Dated November 24, 1937.*

As a Third, Separate and Complete Defense Thereto, the Defendants Further Allege:

Twenty-third.— The allegations contained in said answer numbered "SIXTH" to "NINETEENTH" inclusive are herein re-alleged with the same force and effect as if stated.

Twenty-fourth.—That upon information and belief that
71 on the 20th day of March 1933, the City of Yonkers held securities for its deposits including the Police Pension Fund of the City of Yonkers, negotiable bonds in the sum of $535,000.00 of the First National Bank and Trust Company of Yonkers.

Twenty-fifth.—That upon information and belief that there was on deposit with the said bank on the 20th day of March 1933 moneys belonging to the City of Yonkers in deposits, including the Police Pension Fund, the sum of $328,026.04.

Twenty-sixth.—That upon information and belief that
72 prior to the second day of May 1933 Percival W. Trudeau, as Conservator of the First National Bank and Trust Company of Yonkers, voluntarily released all moneys of the said City of Yonkers, including the Police Pension Fund.

Twenty-seventh.—That upon information and belief the said release of City deposits, including the Police Pension Fund, was made pursuant to instructions of the Comptroller of Currency of the United States, or his deputies.

Twenty-eighth.—That upon information and belief that the said City deposits, including the Police Pension Fund,

were released only after the opinion was given to the Conservator, Percival W. Trudeau by his attorney. 73

Twenty-ninth.—That the said City of Yonkers relying upon the voluntary return of all moneys of the said City of Yonkers surrendered to the Conservator of the First National Bank and Trust Company the aforesaid securities in the sum of $535,000.00.

Thirtieth.—That said payment by the Conservator and his successor was voluntary and without duress or fraud and cannot be recovered back. 74

As a Fourth, Separate and Complete Defense Thereto, Defendant Further Alleges:

Thirty-first.—That the aforesaid payments to the Firemen's Pension Fund were voluntary payments and at the time of said payments the First National Bank & Trust Company of Yonkers was not insolvent.

Wherefore, defendants demand judgment dismissing the complaint, together with costs and disbursements of this action. 75

Leonard G. McAneny,
Corporation Counsel,
Attorney for Defendants,
City of Yonkers, N. Y.

(Duly verified by Joseph F. Loehr, James E. Hushion and Dennis M. Morrissey on February 28, 1936.)

76

Exhibit A, Attached to Answer.

Local Law No. 1.—1931.

(Printed as part of Defendants' Requests for Findings of Fact and Conclusions of Law at pp. 109 to 118.)

Exhibit B, Attached to Answer.

77

Section 69, Second Class Cities Law.

Laws 1909, Chapter 55.

(Omitted for brevity.)

Exhibit C, Attached to Answer.

78

Certified Copy of Resolution of Board of Estimate.

(Printed as Defendants' Exhibit C at p. 96.)

79

Stipulation Amending Complaint and Answer.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

—*against*—

80

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,
Defendants.

L. 63-189.

The attorney for the plaintiff hereby consents that the defendants' answer be deemed amended so as to include 81 therein a paragraph as follows:

"Fourth-A: Denies each and every allegation contained in the paragraph of the complaint numbered 'Thirteenth'."

The attorney for the defendants stipulates and agrees that in consideration of the above consent by the attorney for the plaintiff that the plaintiff may, upon the trial of this action, present proof that the payments referred to in paragraph numbered "Thirteenth" of the complaint occurred from and after the 3rd day of March, 1933 and the

82 *Bill of Exceptions.*

said complaint and answer are hereby deemed to have been amended accordingly.

Dated, November 24, 1937.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Attorney for Defendants.

H. E. GARRITY.

83

Bill of Exceptions.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

84

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

BE IT REMEMBERED, that at a stated Term of the District Court of the United States for the Southern District of

New York, on January 4 and 5, 1938, before the Honorable John Knight, United States District Judge for the Western District of New York, then sitting in and for the Southern District of New York, presiding, the following proceedings were had:

Appearances:

BENJAMIN W. MOORE, Esq., and MILTON L. ROMM, Esq., Attorneys and Counsel for Plaintiff.

LEONARD G. MCANENY, Esq., Corporation Counsel of 86
the City of Yonkers, MORRIS ROSENWASSER, Esq., First Assistant Corporation Counsel, and HAROLD T. GARRITY, Esq., Assistant Corporation Counsel, Attorneys and Counsel for Defendants.

Mr. Moore: The jury in this case is waived.

The Court: The stenographer will note the stipulation then.

Mr. Moore: This is the same type of action except it involves the Police Pension Fund of the City of Yonkers, 87
instead of the Firemen's Pension Fund.

Mr. Downey, will you take the stand.

Mr. McAneny: Will you put in the same stipulation about the order amending the answer that was put in the previous case?

Mr. Moore: Yes.

88 *Walter F. Downey, Plaintiff—Direct.*

WALTER F. DOWNEY, the plaintiff herein, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Mr. Moore: I am offering in evidence the certificate of Mr. Downey's appointment. That is consented to by Mr. McAneny. There was no objection in the other case, and we will have it marked in this case.

89 (Marked Plaintiff's Exhibit No. 1.)

Q. Mr. Downey, did you qualify as Receiver of the First National Bank and Trust Company of Yonkers and are you now acting as such receiver? A. Yes.

Q. Are you in charge of the liquidation of that bank? A. Yes.

Q. What was the official date of the bank's closing.

Mr. McAneny: I object to that on the same ground. I object to it upon the ground that it calls for a conclusion of the witness. I think he should state the facts.

90 Mr. Moore: I withdraw that question. I think I did withdraw it the last time.

Q. You are familiar with the books and records of the First National Bank and Trust Company of Yonkers, are you, Mr. Downey? A. Yes, to the degree that a person can be, having been there since the 15th or 16th of November—the 15th of November.

Q. Do you know from an examination of the books and records of that bank what the official date of the bank's closing was?

91

Mr. McAneny: I object to that as calling for a conclusion of the witness.

Mr. Moore: He is in charge of the books and records there, your Honor.

Mr. McAneny: I will object to it because we stand upon the fact that you have not proved any insolvency as far as we are concerned. You cannot ask these leading questions that call for conclusions.

Mr. Moore: You admitted in the answer the appointment of the Receiver on January 24, 1934; is that correct?

92

Mr. McAneny: We admit a receiver was appointed.

Mr. Moore: I am going to ask the Court to take judicial notice of the fact that the Comptroller does not appoint a receiver for a closed national bank unless it is insolvent.

Mr. McAneny: No.

The Court: The third paragraph of the complaint states and it is not denied that on March 9, 1934 a duly appointed Conservator was appointed of the said First National Bank who took possession of the company and acted until July 24, 1934.

93

Mr. McAneny: It is denied on information and belief.

The Court: I do not see that it is. I do not think the answer denies the third paragraph.

Mr. Romm: The third paragraph is admitted.

The Court: It says also that the Comptroller became satisfied as to insolvency and he was appointed receiver of the bank on the 23rd of January, 1934.

Mr. McAneny: I think that allegation was denied in another case. That admission is only as to the appointment of such official under the law itself. It has to be proved.

94 *Walter F. Downey, Plaintiff—Direct.*

The Court: The Comptroller has the right under the law, I suppose, to declare an institution insolvent, and if the Comptroller has become satisfied as to the insolvency of the bank he appoints a receiver? Isn't that true as to insolvency?

Mr. McAneny: I admit that the Comptroller had become satisfied in 1934 and we concede that so far as the opinion of the Comptroller is concerned as to the propriety, and so forth, the appointment of conservators and receivers was made. We concede
95 as to those facts, but we do not concede insolvency as to the payments made in connection with the facts set forth in this case.

In other words, I believe that when the Comptroller of the Currency acted with respect to a national bank he deems it insolvent and appoints a conservator or a receiver. So far as the depositors of that bank may be concerned, they might be bound and would have no right to withdraw their funds or to take any action contrary to the law or to the powers of the conservator or receiver. I would say that the depositor in a national bank when he makes his deposit assumes that situation. But after moneys
96 have been paid out and conditions have been changed with respect to the parties involved in the paying out of the moneys and then a suit is brought to recover these moneys back, I do not see any authority in the conservator or receiver to recover unless there is an actual insolvency. We have never admitted that this bank is insolvent or was insolvent, and I do not believe it is. No receiver was appointed until long after the moneys were paid out on these checks.

Q. Was there a first dividend of 40 per cent made available to the general depositors on December 16, 1933? A. Yes.

Q. Was a second dividend of 10 per cent made available to the general depositors on November 3, 1937? A. Yes.

Mr. Moore: I want to read into the record Section 2 of Article XI, which is Chapter 452 of the Laws of 1908, Laws of the State of New York.

Mr. McAneny: I believe that counsel is reading from an obsolete publication of the law. I think that the law itself has been amended since the time that this was printed. A Local Law was passed. He is reading an obsolete section of the law.

Mr. Moore: I am going back to the beginning of 98
the law and then I am going to read the last amendment.

Mr. McAneny: But you are not reading the intermediate parts.

Mr. Romm: If you want to read it in evidence, go ahead.

Mr. McAneny: That is not the law at the present time.

Mr. Moore: Section 2 of Article XI, constituting Chapter 452 of the Laws of New York for the Year 1908 reads as follows:

(Omitted for brevity; may be found in Public Laws.) 99

I want to read Sections 1 and 2 of Local Law No. 1 of 1931 of the City of Yonkers. Section 1 reads as follows:

(Printed as part of Defendant's Requests for Findings of Fact and Conclusions of Law at pages 109 to 113.)

Mr. McAneny, will you concede that the office of the City Treasurer of the City of Yonkers was abolished by Article III-A, Section 1, Chapter 667, Laws of New York, 1933? Then I won't have to read it in evidence.

100 *Walter F. Downey, Plaintiff—Cross.*

John B. Power, for Plaintiff—Direct.

Mr. McAneny: Was not it consolidated?

Mr. Romm: It says abolished in the statute.

Mr. McAneny: I will concede that subject to the reading of the law.

Mr. Moore: That will obviate my reading the law. But it is stated for the purpose of the record that Article III-A of Chapter 667 of the Laws of 1933 abolishes the office of City Treasurer of the City of Yonkers.

101 That is all, Mr. Downey.

Cross examination by Mr. McAneny:

Q. Mr. Downey, you were not connected with the First National Bank and Trust Company of Yonkers in any capacity prior to November, 1937, were you? A. November 15th.

Q. What is that? A. I was not connected with the First National Bank and Trust Company of Yonkers prior to November 15, 1937.

Q. These dates that you testified to are not of your own knowledge, but they are information that you have received; 102 is that so? A. Oh, no. The records of the bank will reflect that and also correspondence of the Division of Insolvent National Banks, Bureau of the Comptroller of the Currency.

JOHN B. POWER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Q. What is your present employment? A. Clerk in the employ of the Receiver of the First National Bank and Trust Company of Yonkers, New York, in liquidation.

103

Q. Were you employed by the First National Bank and Trust Company of Yonkers? A. Yes.

Q. For how long? A. Since October 1, 1929.

Q. What position did you hold with that bank? A. Assistant cashier.

Q. Did you continue in the employment of the conservators and of the receivers? A. Yes, sir.

Q. Do you recall March 4, 1933? A. Yes.

Q. What day of the week was that? A. On Saturday.

Q. Was the bank open for any kind of business on that day? A. No.

104

Mr. Moore: At this time I want to offer in evidence a copy of the Proclamation of the Governor of the State of New York closing all banks of the State on March 4, 1933, and an additional Proclamation of the Governor on March 6th. These have both been marked in evidence in the other case. Is that all right?

Mr. McAneny: Yes.

Mr. Moore: No objection to them.

(Marked Plaintiff's Exhibits 2 and 3.)

105

Q. Until what date did the bank continue closed for all business? A. Until March 10, 1933.

Q. Was any business at all transacted between March 4th and April 9th, inclusive? A. No.

Q. Did the bank ever reopen for regular business? A. No.

Q. I show you a ledger here and ask you to tell us what that ledger is (handing to witness)? A. It is a depositors' ledger of the First National Bank and Trust Company of Yonkers.

Q. With respect to what fund? A. Showing the account of the Police Pension Fund, City of Yonkers.

106 *John B. Power, for Plaintiff—Cross.*

Mr. Moore: I would like to have it marked for identification.

(Marked Plaintiff's Exhibit 4 for identification.)

Q. Was Plaintiff's Exhibit No. 4 marked for identification regularly made in the regular course of the bank's business? A. Yes.

Q. Was it the regular course of the bank's business to have these records made on the date when the transactions described to them occurred? A. Yes.

107 Mr. Moore: I offer this book in evidence now, the portions dealing with the Police Pension Fund (handing to Mr. McAneny).

(Discussion between Counsel off the record.)

The Court: What is the date of that?

Mr. Moore: March 2, 1933.

Mr. Romm: To October 6, 1933.

Mr. Moore: I am offering those pages in evidence.

The Court: Received.

(Plaintiff's Exhibit 4 for identification received in evidence.)

108 Mr. Moore: You may examine, Mr. McAneny.

Cross examination by Mr. McAneny:

Q. Mr. Power, the entries in this account, what do they show? A. Show the debits and credits.

Q. They show moneys received by the bank into that account and moneys paid by the bank out of the account; is that so? A. Yes.

Q. Were the moneys paid into that account paid by the City of Yonkers? A. I could not swear to that.

Q. You so testified in the last case. A. Moneys paid in the bank?

Q. Yes, into this account. Who were they received from? A. I do not understand that. Deposits would probably be received by the Police Pension Fund.

Q. I thought you testified before that they were paid into this account by the City of Yonkers.

The Court: He testified that the checks were made by the City of Yonkers.

Q. You say you cannot so testify now? A. No.

Q. You do not know who paid the moneys into the account? A. No. 110

Q. Didn't you see the checks that were deposited into that account? A. Checks deposited in the account?

Q. Yes. A. No.

Q. You did not keep this book? A. No.

Q. Who did keep it? A. The bookkeeper.

Q. What is the name? A. I could not swear at this time what his name is.

Q. Can you tell me one of two or three people? A. Mr. Spyce was a member of the bookkeeping department.

Q. You are familiar with the records of the bank but you do not know who kept that particular book? A. Not that particular book.

Q. Is there any other record of the bank that you do not know personally who kept it? A. I could not swear which book certain associates kept. I am familiar with the records. 111

Q. What is that? A. I am familiar with the records.

Q. All you know about it is that this is a book? A. It is an individual ledger of the First National Bank.

Q. You did not keep the book or put those items into it, did you? A. No.

Q. There was somebody else that did, wasn't there? A. Yes.

112 Q. There is somebody that could testify as to where these moneys came from? A. I won't answer that question.

Q. You won't answer it?

The Court: You mean you cannot answer?

The Witness: I cannot answer it.

Q. You can answer it? A. I cannot.

Q. There is absolutely no means that we might have to determine from whom the moneys came that went into that account? A. Yes, there is means.

113 Q. What is the means? A. Somebody that ran that particular ledger.

Q. That person is alive now, isn't he? A. I believe so. I do not know.

Q. But he is not in court, is he? A. No.

Q. Do you know where he is? A. No.

Q. So you do not know who kept this book? A. Not that particular book, no.

Q. How do you know that is the book of the bank? A. I worked there during those years. I have seen it in the bank and examined it several times.

Q. Did you ever see anybody working on it? A. Yes, I did.

114 Q. Who worked on it? A. Different people.

Q. Can you tell me who they were, what their names were? A. Mr. Spyce, he was the head of the department. There was a young lady named Muriel Woodruff and Miss Cochrane.

Q. Mr. Spyce is employed by the new First National Bank? A. Yes.

Q. The new First National Bank is in the same building? A. Yes.

Q. In the same banking building? A. No. He is in the downstairs office of the First National Bank in Yonkers, the same bank building.

Q. You have testified here that you knew that the entries on that book were made on the same day transactions came into the bank. A. No, it was the custom.

Q. It was the custom? A. Yes.

Q. What do you know about the custom? A. Because I worked there.

Q. What did you work on? A. Assistant cashier.

Q. Did you work on any books? A. I did several years ago.

Q. What books did you work on? A. Books, including from 1919 to 1930, not the First National Bank and Trust Company, but the First National Bank of Yonkers.

Q. Tell me about the items showing money paid out of that account. Where did the records come from from which each of those entries were made? A. From checks.

Q. Will you look at these checks and tell me if those are the original entries in the bank records from which those entries were taken?

Mr. Romm: Individual checks?

Mr. McAneny: Yes.

The Court: You have called on the witness as to the checks. Let him examine them. Over 100. It takes a long time to examine them.

Mr. Moore: While you examine them, I will call Mr. Vanvick.

(Witness temporarily excused.)

CARL H. VANVICK, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Q. Mr. Vanvick, have you been sworn? A. Yes, sir.

118 *Carl H. Vanvick, for Plaintiff—Direct.*

Q. Are you employed by Walter F. Downey as Receiver of the First National Bank and Trust Company of Yonkers? A. I am.

Q. In what capacity? A. Auditor in charge of the books and records and matters relating to the claims.

Q. How long have you been an auditor in the receivership? A. Since April 16, 1934.

Q. What is your experience as auditor? Give it to us as you gave it before.

The Court: Do you need to qualify him again?

119 Mr. Moore: Do you object to his qualification, or do you want him to repeat it?

Mr. McAneny: No, I do not object.

Mr. Moore: He does not object to his qualifications. I will go on.

Q. You are familiar with the books and records as they stand now, the Receiver's records? A. Yes.

Q. What is the official date of the bank's closing, as disclosed by the records? A. March 3, 1933.

Mr. McAneny: May I have that last question?

(Record read by the stenographer.)

120

Mr. McAneny: I object to that as calling for a conclusion.

The Court: Sustained.

Mr. McAneny: I move to strike out the answer.

The Court: Granted.

Q. Do you know the date of the official closing of the bank?

Mr. McAneny: I object to that on the same ground.

The Court: He may say, if he knows. He was not there until the next year.

Mr. Moore: Will you let him state whether he knows or not?

The Court: Yes.

Q. Do you know what the official date of the closing of the bank was? A. Yes, March 3rd.

Mr. McAneny: I object to that and move to strike out the answer.

The Court: It calls for yes or no. 122

Mr. McAneny: The answer should be yes or no.

Q. Do you know? A. Yes.

Q. What date was it?

Mr. McAneny: I object to that on the ground he is not qualified. He has not shown that he was present or connected with the bank. It also calls for a conclusion of the witness. The closing of the bank is a legal matter, not a question of fact.

The Court: This calls for his personal knowledge, not what some books may state, Judge.

123

Q. You are actively engaged now in assisting the Receiver in the liquidation of that bank, are you, Mr. Vanvick? A. Yes, sir.

Q. As of what time are the claims of general depositors calculated and allowed? A. March 3, 1933.

Q. As of what date are set-offs calculated and allowed? A. March 3, 1933.

Q. As of what date is interest on interest-bearing deposits allowed? Up to what time was interest allowed? A. Up to March 3, 1933.

Q. Are you familiar with the ledgers and records of the bank? A. Yes.

Q. Do the bank records show a deposit account maintained under the caption of Police Pension Fund? A. Yes, there were two accounts.

Mr. McAneny: I did not get that answer.

Mr. Moore: He said there were to such accounts.

Mr. McAneny: Two such accounts.

Q. Is that your answer? A. Yes.

Q. Were the accounts interest-bearing checking accounts? A. I cannot answer that, as the ledger does not show any interest credits.

Q. What is the balance, together with the accrued interest, in the two accounts on March 3, 1933? A. The aggregate amount was $29,283.67.

Q. How much of that was in the first account and how much in the second account? A. One account was for $50.

The Court: $50?

The Witness: Yes.

A. (Continuing) The other account, $29,233.67.

Q. When did the first withdrawal from the $50 account occur after March 3, 1933? A. The ledger shows October 26, 1933.

Q. How much was withdrawn from the account on that date? A. $50.

Q. What is the interest due on that withdrawal?

Mr. McAneny: I object to the word "due."

Q. What is the interest on that withdrawal computed from the time of its withdrawal down to the present time? A. I compute it to be $7.66.

Q. On what basis do you calculate the interest? A. Interest at 6 per cent on $50 from October 26, 1933 to December 16, 1933; then on 60 per cent or $30, from December

16, 1933 to November 3, 1937; then on 50 per cent, or $25, from November 3, 1937 to January 3, 1938.

Q. Have you used the same basis in all of your interest calculations? A. Yes, sir.

Q. When did the first withdrawal from the $29,233.67 account occur after March 3, 1933? A. On March 10, 1933.

Q. How much was withdrawn from the account on that date? A. $50.

Q. What is the interest on that withdrawal? A. $9.55.

Q. Did you compute that the same as on the last withdrawal, the same way that the interest on the last withdrawal was computed? A. Yes. 128

Q. You have used the same method in your computations on all of these withdrawals? A. Yes.

Q. When did the next withdrawal from the account occur?

The Court: You are going to do that as you did before?

Mr. Moore: I am going to have him read them all out, the same as he did before.

The Court: All right. State the other withdrawals.

Q. Give the date of the withdrawal and the amount of interest up to the present time, computed as you have told us you computed it in the two cases I have called your attention to and concerning which you have testified. 129

The Court: The separate items are important?

Mr. Moore: A great many items were drawn out on one date. There are not so many.

The Court: Do the questions of the dates and the separate withdrawals matter? The question is the total that we are concerned with.

Mr. Moore: We get the total in the end.

130 *Carl H. Vanvick, for Plaintiff—Direct.*

The Court: I thought we could shorten it further. The totals include the computation made, as he said, from March 3rd down to October for withdrawals and interest as you have stated. You can save time.

Mr. Moore: The next one is March 16th.

The Court: I did not know whether the items were of any importance.

Mr. Moore: Yes, I think it is important to put it in this way.

The Court: All right.

131 Q. March 16th is the next withdrawal? A. March 13th.

Q. Go ahead and tell us about it. A. Withdrawal of $50; interest computed to be $9.52.

March 16, 1933, withdrawals of $216.67; interest computed to be $41.15.

March 17, 1933, withdrawals of $150.00; interest computed to be $28.48.

March 18, 1933, withdrawals of $100.00; interest computed to be $18.97.

March 20, 1933, withdrawals of $283.33; interest computed to be $53.64.

March 24, 1933, withdrawals of $237.50; interest
132 computed to be $44.80.

March 29, 1933, withdrawals of $50.00; interest computed to be $9.39.

March 30, 1933, withdrawals of $266.67; interest computed to be $50.01.

April 1, 1933, withdrawals of $2,681.26; interest computed to be $502.33.

April 3, 1933, withdrawals of $1,489.58; interest computed to be $278.58.

April 4, 1933, withdrawals of $494.79; interest computed to be $92.45.

April 5, 1933, withdrawals of $808.32; interest computed to be $150.90.

April 6, 1933, withdrawals of $370.84; interest computed to be $69.17.

April 7, 1933, withdrawals of $87.50; interest computed to be $16.31.

April 8, 1933, withdrawal of $50.00; interest computed to be $9.31.

April 10, 1933, withdrawals of $145.83; interest computed to be $27.11.

April 11, 1933, withdrawals of $250; interest computed to be $46.42.

April 15, 1933, withdrawal of $50; interest computed 134
to be $9.25.

April 17, 1933, withdrawals of $137.50; interest computed to be $25.40.

April 24, 1933, withdrawals of $141.67; interest computed to be $26.01.

April 29, 1933, withdrawal of $50; interest computed to be $9.14.

May 1, 1933, withdrawals of $2,280.21; interest computed to be $415.95.

May 2, 1933, withdrawals of $1,206.24; interest computed to be $219.84.

May 3, 1933, withdrawals of $16,788.28; interest computed to be $3,056.94. 135

May 4, 1933, withdrawals of $300; interest computed to be $54.58.

May 5, 1933, withdrawals of $316.67; interested computed to be $39.37.

Withdrawals of $216 or $316—$216.67; interest computed to be $39.37.

May 6, 1933; withdrawals of $50; interest computed to be $9.08.

May 9, 1933, withdrawal of $50; interest computed to be $9.06.

May 10, 1933, withdrawals of $104.17; interest computed to be $18.86.

136 *Carl H. Vanvick, for Plaintiff.—Cross.*

John B. Power, Recalled—Cross.

May 15, 1933, withdrawals of $50; interest computed to be $9.01.

July 26, 1933, withdrawal of $1.64; interest computed to be $0.28.

October 26, 1933, withdrawal of $25; interest computed to be $3.83.

Q. Does that complete the account? A. That is right.

Mr. Moore: You may ask, Mr. McAneny.

137 *Cross examination by Mr. McAneny:*

Q. You used the word "withdrawal". You mean moneys paid by the bank on checks which appear from the debit side of the book which was testified to previously? A. Yes.

Mr. McAneny: That is all.

(Witness excused.)

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138 JOHN B. POWER, resumed the stand.

Mr. Moore: Are you ready, Mr. Power?
The Witness: Yes.

Cross examination continued by Mr. McAneny:

Q. Have you examined those checks that I showed you, Mr. Power? A. I have.

Q. Are those the checks from which the entries were made concerning the books you have testified to? A. Yes.

Q. How are those checks arranged there? What are their dates? A. The date of the checks?

Q. Yes. A. The first check is March 31, 1933 through to and inclusive of May 2, 1933.

Carl H. Vanvick, Recalled—Direct. 139

Q. Do each of those checks bear a stamp on the reverse side showing the date upon which it was paid by the bank? A. No.

Q. Do any of them? A. Some of them; not all of them.

Q. How many do not? A. Seventeen.

Q. How many checks are there altogether? A. I counted 147.

Q. With the exception of 17 all bear on the back the imprint showing the date on which the bank paid the money on them? A. It is a perforation.

Q. Moneys paid on those checks were paid to the holders of the checks; is that right? A. Yes. 140

Mr. McAneny: I would like to offer these checks in evidence as one exhibit.

Mr. Moore: May I take them and look them over?

(Checks handed to Mr. Moore.)

The Court: Is there anything further with this witness?

Mr. Moore: No, I think not, but I would like to recall Mr. Vanvick for one question.

Mr. McAneny: Nothing further.

(Witness excused.) 141

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the plaintiff, further testi-

Direct examination by Mr.

Q. Mr. Vanvick, will you now give us withdrawals and the interest as you found it to be A. The total withdrawals were $29,283.67, and the computed interest $5,372.35.

142 *Carl H. Vanvick, Recalled—Direct.*

Q. Did you check up on the first column the added withdrawals upon the Police Pension Fund in the closed national bank of the receiver?

Mr. McAneny: May I have that question?

(Question read by the stenographer.)

Mr. McAneny: I object to that question.

The Court: I think the form is perhaps improper. It shows the total.

Mr. Moore: The total is there.

143 The Court: $5,000 interest and $29,000 total.

Mr. Moore: Mr. McAneny, as in the other case, will you stipulate during the existence of the Police Pension Fund the bank pledged to the City of Yonkers for the security of the repayment of the account, as security for the repayment of certain other accounts bank assets consisting of various bonds?

Mr. McAneny: Yes.

(Paper marked Defendants' Exhibit A.)

Mr. Moore: This is offered in evidence by consent.

The Court: What is that?

144 Mr. Moore: It is Plaintiff's Exhibit 5 in this case.

(Marked Plaintiff's Exhibit No. 5.)

Mr. Moore: Will you stipulate for the record, Mr. McAneny, that the pledged assets by the First National Bank and Trust Company of Yonkers, New York, to secure the Police Pension Fund deposit account as shown by Plaintiff's Exhibit No. 5 in evidence was not made pursuant to or under the statute of the State of New York, or was not made pursuant to or under any local law or ordinance of the City of Yonkers?

Mr. McAneny: No, I won't stipulate that.
Mr. Moore: The plaintiff rests.

Mr. McAneny: I move to dismiss the complaint on the ground that the plaintiff has set forth and proved no facts sufficient to constitute a cause of action in this proceeding. There was absolutely no proof of insolvency. Furthermore, under the existing law and decisions with respect to a situation such as this, these moneys were paid out by the bank 146
in due course, apparently, and there has been absolutely no demand ever made for the return of these moneys at any time. Certainly on that point alone the plaintiff has failed to make out a case, inasmuch as Section 244 of the Second Class Cities Law and Section 64 of that Law, and other laws applicable to the City of Yonkers, require that before a claim or any judgment can be entered against the City a claim must be duly filed in accordance with the provisions of those laws.

The case as it exists is simply a case of a bank having to make payments, not to the depositor, but 147
to outside parties, and having honored the checks, having never made any demand for the return of the money, and having shown no reason for such return so far as this defendant is concerned, in view of the fact that the plaintiff is demanding the return of the moneys apparenty on the ground of insolvency. I do not know of any other grounds. And having failed to prove insolvency, the plaintiff is out of court on that point.

I therefore ask that your Honor dismiss the complaint.

148 *Motion to Dismiss the Complaint.*

The law also requires, the State Law, notice of intention to sue, and that action must be commenced within one year after such notice is filed.

The Court: What do you say on the question of notice?

Mr. Romm: Our position is that the sections cited by counsel for the City do not refer to a claim of the kind in suit. They refer more specifically to claims for work done for the City, personal injury accidents, property suits, and so forth, and not a
149 claim of the character we are suing on.

The Court: They do not specify the particular nature of the claims?

Mr. Romm: As I recall it—I have not read those sections within recent times—it might be worth while to look at them, if your Honor sees fit to do so.

The Court: I will see what the defendant claims as to that. What is the provision as to the presentation of claims?

Mr. Rosenwasser: Section 244 of the Second Class Cities Law of the State of New York reads as follows:

150 (Omitted for brevity.)

That is all from Section 244.

Then there is Section 64, entitled (reading):

(Omitted for brevity.)

Mr. Romm: As to Section 244 of the Second Class Cities Law, which was read by Judge Rosenwasser, it seems apparent from a reading of it that that specifically applies to injuries to persons or property arising from negligence.

The Court: That section does not apply. How about 64?

Mr. Romm: The last one, Section 64 of the Second Class Cities Law, that does not apply to the plaintiff at all, your Honor, because it states, in substance, that a claim must be filed with the proper bodies or officers of the City after the claim has been approved, or rather, after the claim has been approved by a head of the department or officer of the city who hired the claimant. In other words, by those words it could not possibly apply to the plaintiff in this case, because manifestly there is no officer or head of any department in the City of Yonkers who would 152
approve our claim so we could file it with the proper authorities. That section applies to situations where a man does work of some kind for the City of Yonkers or supplies material to it.

And, further, you see that this amounts to a failure to file a claim by giving notice, which is for the first time stated by the corporation counsel in his motion, has never been set up, and that is necessary to this suit. It is our position that it is well established that a defense of that kind must be affirmatively pleaded so it could be heard by the Court.

Mr. McAneny: The complaint alleges that there 153
has been a due demand. That is denied absolutely, which gives an absolute issue on that point. There has not been any demand even proved in this case.

Mr. Romm: Letters have been sent.

Mr. McAneny: I move to strike that out.

The Court: What is that?

Mr. McAneny: I move to strike out the remark of counsel that letters have been sent.

Mr. Romm: And mailed to the defendants.

Mr. McAneny: Do not interrupt me.

Mr. Romm: I was trying to answer the Judge.

The Court: Let the Corporation Counsel proceed.

Mr. McAneny: You did allege due demand. It was denied. You have proved no demand whatever and, furthermore, you proved no due demand under the law.

The Court of Appeals has held that that provision which bases a claim against the city applies to every kind of action, legal or equitable. The case of Thomann *v.* The City of Rochester, 256 N. Y. 165, disposes of that question and the City cannot be held liable without such a claim except on a fixed claim, fixed by contract or a fixed salary or fixed in some way so that the comptroller might be mandamused to pay it; that on any claim upon which there is no fixed liability, upon which a mandamus would not lie, it is required by law that a claim be made.

No such claim has been made in this case and no demand whatsoever. I think if your Honor will read that case I just cited and others we are going to submit to you you will find that that is a fatal defect in the plaintiff's case. The proof of filing the claim is a condition precedent which does not require that it be set up affirmatively. That is one of the points upon which we argue.

We further argue that there has been no insolvency shown, as against the defendants in this action. No insolvency, under the National Banking Law, may be deemed to exist with reference to the ordinary transactions of a bank, that is to say, as between the bank and its depositors. This money is in the bank and they may have closed down and paid it out. It is necessary that they show as a matter of fact that it was paid out while it was actually insolvent. We do not admit that the bank was ever

insolvent or that it is insolvent today, as a matter of fact.

Furthermore, we move to dismiss on the ground that the plaintiff would not be entitled to recover anything without a tender back of the securities.

The Court: Would not it be better to withhold action on your motion?

Mr. McAneny: I think so, so that we can submit a brief on the law.

The Court: So we can dispose of these questions. It does involve a question of a claim and presentation of a claim. So I think it is better to withhold my decision on your motion for the present and hear the defendant's case. It probably won't be very long. 158

Mr. McAneny: You reserve decision?

The Court: Yes, I reserve decision.

STEPHEN A. ROAKE, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. McAneny:

159 Q. Mr. Roake, are you an official of the City of Yonkers? A. Yes.

Q. Holding a position in the City? A. Yes, sir.

Q. What position do you hold? A. Assistant cashier, Department of Finance.

Q. How long have you held that position? A. Since 1923 to——

Q. Continuously? A. Continuously.

Q. Continuously since the year 1923; is that right? A. That is right.

Q. Who in the office of the Finance Department of the City has charge of the cash records of the Police Pension Fund of the City of Yonkers? A. I have.

160 *Stephen A. Roake; for Defendants—Direct.*

Q. How long have you had charge of those records? A. Since that time, December, 1923.

Q. You are acquainted with all transactions, cash transactions, covering that fund, and with the records of the office covering that fund; is that so? A. Yes, sir.

Q. In what bank was the cash of the Police Pension Fund kept? A. In 1933?

Q. Yes. A. In the First National Bank.

Q. First National Bank and Trust Company of Yonkers? A. First National Bank and Trust Company of
161 Yonkers.

Q. Prior to March 3, 1933, will you tell us what was the last deposit made in that account? A. The last deposit was made——

Q. Have you a check to show that? A. I haven't the check in my hand.

Q. I hand you this check and ask you if that check covers such a deposit? A. Yes, sir.

Q. When was that check deposited? A. February 28, 1933.

Q. What is the amount of that check? A. $27,447.76.

Q. And that money went into that fund, is that correct? A. Yes, sir.
162

Mr. McAneny: I ask to have that check marked in evidence.

Mr. Moore: Let me see it.

(Check handed to Mr. Moore.)

Mr. Moore: That is all right.

(Marked Defendants' Exhibit B.)

Q. When that check was deposited in the account what was the blaance of the account? A. Balance on February 28th after that check was made was $32,874.26 in one account and $50 in another account.

Q. There were no further deposits made subsequent to that date in either of these accounts, were there? A. No, sir.

Q. From what fund was this check that you have identified drawn?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

The Court: What is the question?

Mr. McAneny: From what fund did the City pay the check.

The Court: What fund it paid it out of?

Mr. McAneny: Yes. 164

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

The Court: Do you know yourself what fund paid that?

The Witness: Yes; paid from the City of Yonkers General Fund.

The Court: Overruled. You may answer.

Mr. Moore: Exception.

Q. I ask you what the moneys covered by that check represent?

Mr. Moore: I object to that as incompetent, 165 irrelevant and immaterial, your Honor.

Q. (Continuing) If you know. You had charge of the cash accounts, didn't you? A. Yes.

Q. What did that check represent?

The Court: He says they were paid out of the general fund.

Mr. McAneny: I am asking for what purpose and under what authority it was paid into this Police Pension Fund.

66 *Stephen A. Roake, for Defendants—Direct.*

The Court: That brings up the provision of the act by which they were paid? Is that so?

Mr. McAneny: There were various provisions of the Act whereby the City pays certain sums which it deducts from salaries; whereby the City pays certain sums covering the deficit. I am asking what this sum represented.

The Court: I will let him say. How it was contributed?

Mr. McAneny: Yes.

67 Mr. Moore: I except.

The Court: You may have an exception.

A. That check represents the City's contribution for 1932, being 3 per cent or one and one-half times the amount contributed by the members of the Police Department.

Q. It was deposited pursuant to the Local Law? A. Yes.

Mr. Romm: I object to that question.

The Court: Sustained.

Mr. Romm: I move to strike out the answer.

The Court: Strike it out.

68 Q. I ask you to look at these checks which I show you, Defendants' Exhibit A. Do those checks represent moneys paid from the Police Pension Fund into the First National Bank and Trust Company of Yonkers? A. Yes, sir.

Q. Can you tell me for what purpose those checks were issued?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial. I think the checks speak for themselves.

Mr. McAneny: It certainly is not incompetent, irrelevant and immaterial. We have the right to get the facts in the record.

Mr. Moore: The checks speak for themselves.

The Court: The purpose for which they are issued is another thing. He can state the facts, that is true. What do those checks show or represent? What funds do they represent?

Q. Were they paid out? A. It is the pension fund, paid out to pensioners, with one exception.

Q. What is that exception? A. The last check.

Q. What is that check? A. It is a check payable to the Police Pension Fund or withdrawal from the balance in the bank on May 2nd. That was deposited——

170 Mr. Moore: I object to the bank where it was deposited.

The Court: Overruled.

Mr. Moore: Exception.

The Court: He has answered and said that that one is not included. Did you say that?

The Witness: Not included—it is included with payments made by the fund, but it is not a pensioner, paid to a pensioner. It is payable to the fund itself from the First National Bank to another bank.

Q. What bank was that?

171 Mr. Moore: I object to it as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. McAneny: Exception.

The Court: It was just transferred to another bank, I suppose.

Mr. McAneny: That is all.

Cross examination by Mr. Moore:

Q. Will you please examine Defendants' Exhibit B in evidence and state whether or not there is anything in that exhibit which in any way indicates the origin of the moneys represented by that check? A. City of Yonkers funds.

72 *Stephen A. Roake, for Defendants—Cross.*

Q. Is there anything on that exhibit which indicates that it is the City of Yonkers fund?

Mr. McAneny: You are asking for a conclusion there, it seems to me. It speaks for itself.

Mr. Moore: I am asking with respect to these exhibits.

The Court: I will let him answer.

A. City of Yonkers check, drawn on the City of Yonkers account.

73 Q. How do you know that? A. It so says on the check, signed by the Treasurer and countersigned by the Comptroller of the City of Yonkers.

Q. What is the name of the Comptroller appearing on that exhibit? A. James J. Hushion.

Q. In addition to being Comptroller of the City of Yonkers he was also a trustee of the Police Pension Fund? A. He was.

Q. What name appears above his name as Treasurer? A. G. W. Klein.

Q. In addition to being Treasurer of the City of Yonkers G. W. Klein on February 28, 1933 was also Treasurer 74 of the Board of the Police Pension Fund?

Mr. McAneny: I object to that unless the witness knows, because he is asked a question——

Mr. Moore: He will answer whether he knows. If he does not know, he will tell us.

Mr. McAneny: Why not ask him something that he does know?

The Court: What is the question?

(Question read by the stenographer.)

Q. (Continuing) Wasn't he? A. I cannot answer that question in that way.

Q. Did you ever see any checks which bore the legend "Police Pension Fund of the City of Yonkers"? A. I have.

Q. Didn't they state at the top "The City of Yonkers, New York" the same as Exhibit B in evidence, Defendants' Exhibit B in evidence? A. No.

Q. Are you sure of that? A. I am sure of that; yes.

Q. Then is it true that the only way you have of knowing that Defendants' Exhibit B in evidence comes from the general fund of the City of Yonkers is the fact that it bears the caption "The City of Yonkers, New York"? Is that correct? A. Yes, it is a City of Yonkers check. 176

Q. Is that the only basis upon which you said that the funds represented by that check come from the general fund of the City? A. Yes.

Q. Did you testify on cross examination that the $27,447.46 represented by Defendants' Exhibit B in evidence constitutes one and one-half times the amount of moneys deducted from the monthly pay in salary of the members of the Police Department of the City? A. Yes, sir.

Q. How do you know that? A. I know that from the records.

Q. Do you have those records here? A. I have one of the cash records of the account here, yes.

Q. What records? A. The cash book account of the 177
Police Pension Fund.

Q. Do they show that this $27,447.76 comes from salaries—rather, it represents one and one-half times the amount deducted from the salaries of members of the Police Department? A. It shows that that is the 1932 contribution by the City.

Mr. Moore: I move to strike out the answer as not responsive.

The Court: It is not responsive. Does that represent the 1½ per cent?

The Witness: It does represent that, yes.

178 *Stephen A. Roake, for Defendants—Cross.*

Q. How do you know that it does represent one and one-half times the amount deducted from the payroll of members of the Police Department? A. Well, from the cash book itself, which claims that is the 1932 contribution.

Q. Have you that cash book here? A. It is here.

Q. Will you produce it, please? A. (Witness hands book to Mr. Moore.)

Q. Have you examined that cash book? A. Yes, sir.

Q. Does the cash book show the total sums deducted from the salaries of members of the Police Department for
179 the year 1932? A. It does, but not in one lump sum.

Q. Can you compute the total from the cash book? A. I can, yes.

Q. How long would it take you to do so? A. I would have to go over the entire year of 1932 and check them up semi-monthly.

Q. Do you have the monthly totals? A. No.

Q. Can you tell us the name of one member of the Police Department reflected in that cash book, any one of them? A. No.

Q. It does not state any one? A. I cannot, no.

Q. How can you possibly state that that cash book will
180 reflect the total payments deducted from members of the Police Department for the year 1932— A. Because the contributions are entered in here semi-monthly as payroll deductions are made.

Q. Who makes the payroll deductions? A. Those deductions are made by the Department, certified by the Department, and made to the Comptroller, and the Comptroller makes the checks out in detail and the 2 per cent deduction is made in one check for the entire payroll and that is turned over to myself and deposited in this fund.

Q. The 2 per cent total is one lump sum? A. That is right.

Q. That is turned over to you? A. Semi-monthly.

Q. Semi-monthly? A. Yes, sir.

Q. Can you show us one entry which indicates any one semi-monthly payment turned over? A. Yes.

Q. Where is that? A. April 23rd, City of Yonkers, 2 per cent of payrolls of February 16th to 28th, $768.32.

Q. Before testifying that the $27,447.76 represents one and one-half times the amount deducted from police payrolls for the year 1932, did you do any computation of any kind? A. I did not, no.

Q. It is true that you do not know whether or not the $27,447.76 actually represents one and one-half times the 1932 deductions from the Police Department payrolls; is that true? A. I do know from my own deductions, from my own conclusions, rather. 182

Q. You do not know from any other source; isnt that true? A. Only from the record.

Q. You did not compute the entries in the book, did you? A. I did not.

Mr. Moore: That is all.

Re-direct examination by Mr. McAneny:

Q. That cash book that you have is one of the books of the City of Yonkers, is it not? A. Yes. 183

Q. One of the official books? A. Yes.

Q. And kept in the office? You used that book to make various calculations with respect to this fund, did you not? A. Only to keep track of the cash deposited in these various funds.

Q. Counsel has brought out that deductions from salaries are covered by a single check turned over to you and deposited. Is that correct? A. Yes, sir.

Q. There are other deposits made in this fund, are there not? A. Yes.

Q. Made by you? A. Yes.

184 *Stephen A. Roake, for Defendants—Re-direct.*

Q. In what form did you make those deposits? A. Those deposits, of course, are made from other sources, such as interest on mortgages, and so on, held by the fund.

Q. Did you receive the other matters, the fines, and matters of that kind? A. Yes.

Q. Did they come in the form of a check? A. They are made by the same deduction from the payroll.

Q. They are turned over to you in the form of a check or checks? A. Yes, sir.

Q. You deposited those in this fund? A. Yes, sir.

185 Q. Can you recollect any other receipts that you received from any source that you put into this account and the manner in which you received it? A. From receipts of the City of Yonkers.

Q. From fines? A. The fines—they are receipts such as the deficits at the end of the year.

Q. And the Local Law, didn't it refer to certain other sources from which moneys were put into this fund, for instance fees paid for testing and inspecting combustibles? How did you receive those? A. I do not recall offhand of receiving any such funds.

Q. How about deductions for loss of time or absences or suspensions from duty? That is taken off the payroll 186 and comes to you in the form of a check from the Department; is that right? A. That is correct.

Q. For loss or stolen moneys remaining in the hands of the Police Department for a period of one year, did you get items of that kind? A. Occasionally, yes, sir.

Q. Was that turned over to you in cash or check or how? A. Sometimes in cash and sometimes in check.

Q. Items like the one I last described and such as various other items under the Local Law; they would go into the General Fund of the City, if there were items——

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. McAneny: Exception.

Q. You have examined the checks in Defendants' Exhibit A, have you not?

Mr. Moore: The checks are in front of you there.

A. Yes, sir.

Q. Then you examined these other checks, Defendants' Exhibit B, have you not (handing to witness)? A. Yes, sir.

Q. And they are signed identically; is that so? A. That 188
is correct; yes, sir.

Q. Both drawn on the same bank? A. No.

Q. And both are identically signed by James J. Hushion, Comptroller and Gustav Klein, Treasurer? A. Yes.

Mr. Moore: I object to that. The checks speak for themselves.

The Court: It is true that the checks show that, yes.

Mr. McAneny: That is all.

Mr. Moore: That is all.

The Court: Do you want to go through with these 189
now?

Mr. McAneny: I would like to take a recess, if I may. I get a little tired on account of my eye condition.

The Court: We will adjourn until 10:30 tomorrow.

(Adjourned to January 5, 1938 at 10:30 a. m.)

190 *Gustav W. Klein, Jr., for Defendants—Direct.*

TRIAL RESUMED.

GUSTAV W. KLEIN, JR., called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. McAneny:

Q. Mr. Klein, are you an officer of the City of Yonkers? A. I am.

Q. What position do you hold? A. Deputy Comptroller, Department of Finance, City of Yonkers, New York.

Q. How long have you had that position? A. Since
191 January 1, 1934.

Q. Prior to January 1, 1934 what position did you hold? A. I was Treasurer of the City of Yonkers.

Q. How long did you hold that position? A. From January 1, 1932 to December 31, 1933.

Q. The office of Treasurer of the City of Yonkers was an elective office, was it not? A. It was.

Q. You were elected by the people to that office? A. That is right.

Q. For two terms? A. For one term.

Q. And then on December 31, 1933 the position of Treasurer was abolished by law, was it not? A. That is true.

192 Q. You were then appointed Deputy Comptroller? A. That is right.

Q. Prior to being City Treasurer, what position did you hold with the City? A. I was not with the City at the time.

Q. You were not with the City prior to that time? A. The last I served with the City was during 1926 and 1927.

Q. What position did you hold? A. Deputy City Treasurer under the then City Treasurer George Griot.

Q. You heard Mr. Stephen Roake testify? A. I did.

Q. He was assistant cashier under you as City Treasurer, was he not? A. He was.

Q. From January 1, 1932 until December 31, 1933; is that right? A. That is right.

193 Q. He was an employee in your department? A. He was.

Q. Under your jurisdiction? A. That is right.

Q. And as City Treasurer, what were your duties? A. The duties were to see, of course, that the tax collections and the money received by the City from various departments were properly placed in the bank and checks had to be countersigned by the Treasurer and then the Comptroller; general supervision of the office of the City Treasurer; and also to see when money was deposited in the bank that the bank properly secured, or we got security from the 194 banks in which these deposits were placed.

Mr. Moore: I object to that and move that the last part of the answer be stricken out.

The Court: What was the question?

(Record read by the stenographer.)

The Court: It may go out. I suppose his duties were fixed by statute.

Mr. McAneny: I take an exception.

The Court: Stricken out, and exception to the defendants.

Mr. McAneny: I would like to offer in evidence a certified copy of the resolution of the Board of 195 Estimate and Apportionment of the City of Yonkers. I would like to read it into the record.

Mr. Moore: I object to the introduction of it. It is not an ordinance or a law, and I object to it as incompetent, irrelevant and immaterial.

Mr. McAneny: It certainly is not incompetent, irrelevant and immaterial, but has a bearing on our case, on part of the proof in the case. It is a certified record. Are you objecting to that?

Mr. Moore: No, but it is not an authorization of law.

Mr. McAneny: It is. I will connect it up with the law.

Mr. Moore: I object to it on the ground that it is incompetent, irrelevant and immaterial.

The Court: It is on a question presented in this case. I think it should be received at this time. It may be competent and may not be competent. I cannot determine at this time. I am going to receive it.

Mr. Moore: May we have it marked for identification first?

Mr. McAneny: I would like to read it into the record.

The Court: Just a moment until we get it marked.

(Marked Defendants' Exhibit C.)

The Court: I am going to receive it. I think at the most it might be immaterial if it has not a bearing on the question as to the funds.

Mr. Moore: May I have an exception?

The Court: Yes.

(Mr. Garrity reads Defendants' Exhibit C.)

Mr. Moore: I move to strike out the resolution that has just been offered and read as incompetent, irrelevant and immaterial, and upon the ground that it does not anywhere mention the First National Bank and Trust Company of Yonkers.

Mr. McAneny: I will connect that, your Honor.

The Court: Motion denied.

Mr. Moore: Exception.

Mr. McAneny: I would now like to read into the record a section of the Second Class Cities Law, Sections 69 and 70 of the Second Class Cities Law, which is a law covering the City of Yonkers.

Mr. Garrity: Second Class Cities Law of 1909, Chapter 55 as Amended:

(Omitted for brevity.)

Mr. Moore: I move to strike out the two sections that have just been read as incompetent, irrelevant and immaterial. 199

The Court: Are you offering the copy of these acts themselves?

Mr. McAneny: The laws themselves. I am sure that the Court takes judicial notice of the State laws.

The Court: If that were true, a motion to strike out is not necessary.

Mr. Romm: They read it into evidence, that is why the motion is made.

The Court: Motion denied. 200

Mr. Moore: Exception.

Mr. McAneny: I ask counsel for the plaintiff to concede that the Yonkers Trust Company and the First National Bank and Trust Company subsequent to this resolution were consolidated and merged.

The Court: What is the date of that?

Mr. McAneny: And the consolidation agreement filed in the office of the Register of Westchester County. Date of merger is September 30, 1929. Do you concede that?

Mr. Moore: There was another bank, the Bryn Mawr-Nepperhan. Those three were consolidated and became known as the First National Bank and Trust Company of Yonkers on September 30, 1929. 201

Mr. McAneny: The consolidated bank, you will concede, assumed all the obligations of the constituent banks.

Mr. Moore: I cannot concede that. I do not know.

Q. Subsequent to that consolidation, Mr. Klein, did you continue to carry accounts of the City in the First National Bank and Trust Company? A. I did.

202 *Gustav W. Klein, Jr., for Defendants—Direct.*

Q. Will you look at the checks, Defendants' Exhibit A, and will you tell me if that is your signature that appears on each of those checks (handing to witness)? A. Yes; that is my signature on each of those checks.

Q. There is a second signature on each of those checks? A. Yes, there is.

Q. Whose signature is that? A. James J. Hushion, Comptroller.

Q. Do you know his signature? A. Yes.

Q. That is his signature on each one of them? A. I did
203 not look.

Mr. Romm: Just a minute. He says he did not look.

The Court: What is your answer?

The Witness: 74 of these checks were signed by Mr. Hushion and 73 were signed by the deputy, Rayfield E. Marchand.

Q. He was Deputy Comptroller of the City of Yonkers at the time he signed those checks? A. He was.

Q. Will you look at Defendants' Exhibit B, Mr. Klein, and tell me if that is your signature on that check? A. Yes,
204 sir.

Q. Do you recognize the other signatures on that check? A. I do.

Q. Whose signature is that? A. James J. Hushion, Comptroller.

Q. You know his signature? A. I do.

Q. Mr. Klein, I show you a paper produced from the files of the Finance Department of the City of Yonkers and ask you if you can identify that paper? A. Yes, that is a claim.

Q. Is that produced from the files of the City of Yonkers? A. It is.

Q. Is that an original paper? A. Yes, it is.

Q. Was the check which you have just identified as having your signature the last check drawn upon that warrant or that claim?

Mr. Moore: What was that warrant? May we have it marked for identification?

Mr. McAneny: I am trying to connect it.

A. The claim bears No. 170,736, and the check bears the number 170,736; therefore this check is in payment of this warrant. 206

Mr. McAneny: I offer the warrant in evidence.

The Court: Submit it to counsel.

Mr. Moore: Let me see it.

(Marked Defendants' Exhibit D.)

Mr. McAneny: I would like to have it read into the record.

The Court: All right.

(Mr. Garrity reads Defendants' Exhibit D.)

Q. Mr. Klein, you had in your custody as City Treasurer the securities, a list of which has already been placed in evidence in this case; is that a fact? A. Yes. 207

Q. As of March 3, 1933, could you state what the par value of those securities were in your possession? A. The par value of these securities was $535,000.

Q. Part of these securities were returned to the First National Bank and Trust Company of Yonkers or its representatives? A. They were all returned with the exception of $1,000.

Q. Have you receipts for the return of those securities? A. I have.

208 *Gustav W. Klein, Jr., for Defendants—Direct.*

Mr. McAneny: I offer these receipts in evidence.

Mr. Moore: Let me see them.

(Documents handed to Mr. Moore:)

Mr. Moore: No objection.

(Marked Defendants' Exhibit E.)

Q. Did you see these receipts signed by the Conservator? A. I saw some of them signed by him. I do not remember if I saw them all signed.

209 Q. Do you know his signature? A. I think I do.

Q. You have seen him write? A. Yes.

Q. Is that his signature on all of those documents? A. I would say it is.

Q. Prior to September 30, 1929, when the First National Bank and Yonkers Trust Company merged, did the City have deposits in either of those banks?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial, your Honor.

The Court: I do not see how it is material. What is your point?

Mr. McAneny: They were put in evidence; the

210 plaintiff has put in evidence a list of $535,000 worth of securities, and we certainly have a right to show, since he has put them in evidence, what they covered and the history of the transactions. That is my only reason for saying that I believe we have a right to go into these facts. It all concerns the pledge of these assets and it is relevant, I think.

Mr. Moore: That was before the time we came into this picture, your Honor.

The Court: That was back in 1929.

Mr. McAneny: That may be so, but they put in evidence these securities, and I intend to show that

the securities were carried on, and I think I have a right to show that.

The Court: These securities were delivered to the First National Bank and Trust Company, I suppose, subsequent to 1929.

Mr. McAneny: Oh, no. No, I will show they were in the possession of the City before 1929 and were carried there.

The Court: At the time this bank was not named as a depository.

Mr. McAneny: The constituent banks were. 212

The Court: The constituent banks, not all of them. I will receive it.

Mr. Moore: Exception.

The Court: What is the question?

(Question read by the stenographer.)

Mr. McAneny: They are constituent banks.

The Court: Prior to September, 1929?

Mr. McAneny: That is it.

A. They did.

Q. Which of those banks did they have deposits in? A. In 1929? 213

Q. Yes. A. I was not connected with the City in 1929, and therefore I do not know exactly what banks they had deposits in.

Q. When did these securities come into your possession? When you became Treasurer in 1932? A. Yes, when I assumed office in 1932 the list of securities was turned over to me by the outgoing treasurer.

Q. Were they turned over to you in bulk? Were they segregated in any sense? A. They were separated into envelopes, in envelopes like that one here (indicating), had all the lists of the First National Bank securities, and the

214 *Gustav W. Klein, Jr., for Defendants—Direct.*

other banks were designated in the same way. This is a list of the Yonkers National Bank and Trust Company and the Central National Bank.

Q. They were not segregated as being applicable to any particular fund? A. No.

The Court: How do you mean they were? They were then set apart in that way? You said some of them referred to one bank and some the other; some referred to the First National Bank and some the other bank.

215 Mr. McAneny: I am talking only of the securities of the First National Bank and Trust Company.

The Court: His answer was not that. There was some way of designating other banks there; his answer implies that.

The Witness: All the securities covering the one bank was kept in an envelope by themselves.

The Court: $535,000 was kept in one envelope by itself?

The Witness: This envelope here (indicating).

216 Q. That was kept in one parcel? A. Yes.

Q. Do you recall whether you have records showing what the amount of the securities was that was originally turned over to you? A. No, I have not got that list here.

Q. You do not know approximately? A. No, I could not say.

Q. What was your practice after you became City Treasurer with respect to deposits in the First National Bank and Trust Company? What did you do when you made a deposit and carried on that account? A. The practice was to see that whatever balance in the bank was—that the City of Yonkers had securities sufficient from the bank to cover those deposits.

Mr. Moore: I move to strike that out as not responsive, your Honor.

The Court: Is there any question that these are not covered by this deposit?

Mr. Romm: Later on it may develop that the pledge did not cover all of the accounts.

The Court: Counselor, you admitted that they did; $535,000 was sufficient to cover all of the deposits or it was not. Was the $535,000, as you contend, sufficient to cover all the deposits at that time?

Mr. McAneny: Yes. Yes, it was sufficient to cover 218
all deposits.

The Court: In this bank, I mean.

Mr. McAneny: As of March 3, 1933. Just a minute.

Q. Mr. Klein, you testified that $534,000 par value of these securities were returned by you to whom? To Mr. Trudeau? A. Mr. Trudeau.

Q. $534,000. You still have $1,000 that you are holding? A. Yes.

Q. When you returned those securities on the occasion of your returning them to Mr. Trudeau, what was your arrangement or understanding with him about the return of 219
those securities?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial, what his understanding with Mr. Trudeau was, as a conclusion of the witness.

Q. What was said between you and Mr. Trudeau? A. As I recall the conversation, Mr. Trudeau said that when we released the securities he would release the money; as soon as we released the securities and as the balance in

220 *Gustav W. Klein, Jr., for Defendants—Cross.*

the bank dropped, to give him back so much security so that both accounts were practically equal at all times. As the money was released, we released the securities.

Q. As the City deposits were released, you mean? A. Yes.

Mr. McAneny: That is all.

Cross examination by Mr. Moore:

Q. You were the Treasurer of this Police Pension Fund, were you, Mr. Klein? A. Yes.

221 Mr. McAneny: I cannot hear you.

Mr. Moore: I said "You were the Treasurer of this Police Fund then," and he said he was.

Q. Are you treasurer of it now, Mr. Klein? A. No.

Q. Who is the treasurer of it now? A. There is no treasurer. The Comptroller is the man that is designated now.

Q. You were acting for yourself and for the three trustees of the Police Pension Fund, weren't you?

Mr. McAneny: I object as calling for a conclusion and as not asking for any statement of fact.

222

Q. How many trustees were there of the Police Pension Fund?

Mr. McAneny: I object. That is covered by the law itself.

Mr. Moore: He knows.

The Court: I will let him answer.

A. Three.

Q. Who were they? A. The Mayor, the Commissioner of Public Safety and the Comptroller.

Q. When you were Treasurer you were treasurer of this fund? A. That is right.

Q. Once moneys got into this fund they were used for purposes of the police, were they?

Mr. McAneny: I object to that on the ground that the law covers the uses of this money.

Q. If you know?

Mr. McAneny: It was not used for the purposes of the police. The law specifically says that it is to be used for pensions, police pensions or police widows' pensions. 224

The Court: I will let him state so far as he has practical knowledge as to how these funds were applied.

Mr. McAneny: Exception.

Q. How were the funds applied? A. They were in payment of pensions to widows and those entitled to them.

Q. And the contributions which the City made were not returned to the City? A. No, they went into that fund.

Q. You say you kept those securities did you, Mr. Klein? A. I did. 225

Q. Where did you keep them? A. They were in a strong box in the safe of the City Treasurer's office.

Q. Did you have a safe deposit vault box No. 1988 in the First National Bank and Trust Company of the Yonkers Building? A. There was a safe deposit box down there. I could not tell the number right now.

Q. Did you keep the deposits there, I mean the securities there? A. The securities were kept in a safe deposit box in the bank building, that is right.

Q. They were not kept in the safe in the Comptroller's office? A. No. The lists of securities were kept there. No securities were ever kept in the Treasurer's office.

226 *Gustav W. Klein, Jr., for Defendants—Cross.*

Q. There was no written agreement between the bank and the City with reference to securities for deposits, was there? A. Not that I know of.

Q. You never saw one and never heard of one? A. No.

Q. Can you tell us in whose name this safe deposit box in the Yonkers National Bank and Trust Company was in which these securities were kept? A. As I recall, it was designated as the City of Yonkers, the paper that I signed every time I went to release securities or get some more.

Q. It was known as the Treasurer of the City of Yonkers and the First National Bank and Trust Company of
227 Yonkers? Wasn't the box in those two names? A. I cannot say that.

Q. Would you say it was not? A. No, I would not say it was not.

The Court: Is there anything further, Mr. McAneny?

Mr. McAneny: I would like to ask that in the Firemen's Pension Fund case that it be considered that the testimony of the witness with respect to his action pursuant to the order of the Board of Estimate and also the laws governing the Board of Es-
228 timate and the laws applicable thereto be included in that case, with leave that the case be reopened, inasmuch as there is no jury. I would like to request that it be conceded that this testimony be inserted in that case.

Mr. Romm: The resolution of the Board of Estimate of Apportionment?

Mr. Moore: I have the same objection as I had before, that it is irrelevant and incompetent and immaterial.

The Court: With that understanding, perhaps you better specify as to what is to be included and what your offer is. You say all that refers to certain testimony. You better be specific about it.

Mr. McAneny: I would like to include the resolution of the Board of Estimate and Apportionment and the sections of the law that were referred to, Section 69 and Section 70 of the Second Class Cities Law and the testimony to the effect that Mr. Roake was a member of the City Department and then in addition that he qualified in that case, along the same lines. I would like to offer in evidence in that case the claim in the Firemen's Pension Fund upon the check which has been offered in evidence here was paid; I would like the witness to identify it.

230

Mr. Moore: I object to all this upon the same ground that I objected to it in this Police Pension Fund case, on the ground it is incompetent, irrelevant and immaterial.

The Court: I understand you do not object to the reopening of the case for the purpose of offering this testimony?

Mr. Moore: No, I have no objection to that.

The Court: Subject to your right to raise the objection which you have raised in this case to the similar testimony, notwithstanding the fact that it is received, the objection is overruled and an exception noted.

231

(Witness excused.)

STEPHEN A. ROAKE, recalled, further testified as follows:

Direct examination by Mr. McAneny:

Q. Mr. Roake, in Plaintiff's Exhibit 4 it appears that there were two accounts carried under the Police Pension Fund, one apparently for $50 as of March 30, 1933 and the other for a larger amount; is that correct?

232 *Stephen A. Roake, Recalled—Direct.*

Mr. Romm: Will you read the question, please?

(Question read by the stenographer.)

Mr. McAneny: I withdraw that question.

Q. Can you explain why there are two?

The Court: Explain those two accounts.

Q. Can you explain those two accounts? A. The March 3rd?

233 Q. Yes, the March 3, 1933. A. The National Bank account, as we identify it, $29,233.67 and the $50 account carried in a separate account was an old Yonkers Trust Company account. At the time of the merger I asked the bank if they would keep these accounts separate for our identification because there were a number of outstanding checks on the old Yonkers Trust Company account, and they continued to carry that $50 item separately. It was out of the old Yonkers Trust Company account.

Q. They carried that on the books of the First National Bank and Trust Company? A. That is correct.

Q. Mr. Roake, have you a copy of the budget of the City of Yonkers for the year 1931 before you? A. I have.

234 Q. Will you turn to an item there under the caption of Police Pension Fund? A. Yes, sir.

Mr. Moore: May we have it marked for identification, Mr. McAneny?

Mr. McAneny: Do you object to a copy of the budget that I am producing?

Mr. Moore: I haven't seen it at all. I assume it is all right.

(Marked Defendants' Exhibit F for identification.)

Q. There is such an item there under that title? A. Yes, sir; in the 1931 estimate.

Q. That is the annual estimate of the City, isn't it? A. Yes.

Q. Can you state what that account is? A. Contributions to the Police Pension Fund, $27,625.02.

Q. Is that the estimated amount at the time? A. Yes.

Q. Will you look at the budget of the City of Yonkers for the year 1932? You have a copy of it before you? A. I have.

Q. Will you turn to the item in that budget under the 236
title of "Police P sion Fund"

Mr. McAneny: I ask to have this marked for identification.

(Marked Defendants' Exhibit G for identification.)

Q. Do you find such an item? A. I do.

Q. Will you state what that amount is? A. Contribution to the Police Pension Fund, $28,330.13.

Q. That is an estimated amount? A. That is an estimated amount, yes.

Q. That was all included in the annual budget of the 237
City of Yonkers? A. Yes.

Q. Budget for 1932? A. That is right.

Q. Have you also before you a copy of the budget of the City of Yonkers for the year 1933? A. I have.

Q. Does that include an item headed "Police Pension Fund"? A. It does.

Mr. McAneny: I would like to have this marked for identification.

(Marked Defendants' Exhibit H for identification.)

238 *Stephen A. Roake, Recalled—Direct.*

A: (Continuing) Contributions to Police Pension Fund for 1933, $28,527.36.

Q. Those figures are included in the annual estimate of the City, are they? A. Yes.

Q. That is an estimated amount? A. Right.

Mr. McAneny: I would like to offer in evidence Defendants' Exhibits F, G and H as being copies of the annual estimated budget of the City of Yonkers, and particularly with regard to the entry as to the Police Pension Fund.

239 Mr. Moore: I haven't any objection to the Police Pension Fund, but I have an objection to the introduction of these entire budgets into the case.

The Court: I assume you are introducing only that part of it which refers to the issue here on this pension fund.

Mr. McAneny: That is right.

Mr. Romm: That is in evidence without objection. There is no necessity to offer the papers in evidence.

The Court: He has testified to the facts.

Mr. McAneny: I will just offer it to the extent 240 of those entries.

Mr. Moore: All right.

The Court: Received with that limitation.

(Defendants' Exhibits F, G and H for identification received in evidence.)

The Court: Have you the pages there?

The Witness: Page 3 of Exhibit H; page 58 of Exhibit F; and page 2 of Exhibit G.

Mr. McAneny: That is all.

Cross examination by Mr. Moore:

Q. Mr. Roake, those were contributions made to the City to these funds, were they? A. Those were estimates of contributions to be made.

Q. Do the estimates and the actual amounts contributed there coincide? A. Very closely.

Q. Or agree as to amount? A. Very closely.

Q. That money once having been turned into either of those funds was never returned to the City, was it?

Mr. McAneny: Are you asking as a matter of fact or matter of law? 242

Mr. Moore: I am asking him whether he knows about it as a matter of fact. He has been there since 1922.

Mr. McAneny: You asked him if any money had been returned to the City by these funds or whether it should be returned by the City.

Q. I am asking you if when this money got into the Police or Firemen's Fund it became a part of that fund? A. It does.

Mr. McAneny: That is calling for a conclusion of the witness and is a matter of law. 243

The Court: I think that fact appears.

Mr. Moore: I do not think I will ask him any more. That is all.

Mr. McAneny: I ask that that question and answer be stricken out.

Mr. Moore: No, I think it should stand.

The Court: It may call for a conclusion if it does appear that these funds were deposited as contributions and depesited in a special fund. I think that is sufficient for the purpose.

Mr. McAneny: That is true.

The Court: I will strike it out; the motion is granted to strike out.

Mr. Moore: Exception.

Mr. McAneny: It is a question of law.

The Court: I understand that.

Mr. McAneny: That is all.

By Mr. Moore:

Q. Were those payments paid in the other years for the year 1933? You have given us two checks and those were similar payments made in the two previous years 1932 and 1931? A. Yes, sir.

Q. They were? A. Yes, sir.

Mr. Moore: That is all.

(Witness excused.)

Mr. Moore: The plaintiff rests; your Honor.

Mr. McAneny: The defendant rests.

Mr. McAneny: I renew my motion to dismiss the complaint upon the grounds already stated, which are to the effect that so far as moneys that were paid out on these checks are concerned, there is no evidence of any insolvency of the bank.

Furthermore, that the moneys were public moneys within the intention and within the wording of Section 90 of the National Banking Law and that they were legally secured, and that any payment out of this account was secured in any manner and particularly in the manner covered by the testimony in this case showing a legal and valid

transaction binding upon the bank, the Conservators and Receivers.

On the further ground that there has been no demand made against anyone for the return of any of this money and there has been no service of any claim upon the officers of the City, as required by the laws of the State of New York.

It seems to me that viewing the whole circumstances in this case it would be iniquitous to claim or hold that these trustees who have acted within the law and who have received these moneys and deposited them in the national bank and being fully secured as to all their deposits, having no profit whatever in this situation, acting merely as trustees and having in good faith drawn these checks and these checks having all been paid out by the bank without question, that now six years later we should be haled into court and told that these trustees are personally liable and must refund these moneys; it seems to me that the whole course of conduct of the trustees and the bank and the representatives of the bank would make such an act very inequitable. So far as I can see, it is absolutely legal. 248

The cases hold that the State of New York, and it is the practice of the state banks and other institutions or depositories to give securities for public money, and I believe that the interpretation of Section 90 by the United States Supreme Court in the case just mentioned, *McNair, Receiver,* v. *W. D. Knott, Treasurer,* decided December 13, 1937 and not yet made public and published in the law books, covers this whole situation very clearly. 249

In that case the Supreme Court determined that in a case where there might be any question of competition for the deposit of public moneys between national banks and state banks, that the national banks could cover the course of procedure and take the same steps that state banks might take or that might affect state banks.

250 *Motion to Dismiss the Complaint.*

In the case cited of the *City of Mount Vernon* v. *The Mount Vernon Trust Company*, decided by the Court of Appeals of this state, I think a careful examination of that opinion would show that the Court said that the City of Mount Vernon having received such securities for its municipal deposits of about $1,000,000 from the Mount Vernon Trust Company, that they might not be entitled to hold and hypothecate those securities and they could not secure them back without repaying to the City the amount of the deposit.

251 It is the same situation that might be urged in this case. In other words, the City had the securities and the bank paid through the medium of these checks, I think no payments were ever made directly to the City, through the medium of these checks to those persons who presented the checks and received their money, the bank paying up to the amount of the City's deposits and received back its collateral, and it is apparent from this record that there were particular City funds or City deposits which were covered by the same collateral. But it is apparent that the same procedure went through with without question and the bank paid these checks and got their collateral back, and that is what the Court of Appeals says they would have to do in
252 this State. I believe that the United States decisions from its Supreme Court and the one I last cited would bear out the fact that under such conditions the First National Bank and Trust Company had that power to make this deposit of securities and were within their legal rights in getting them back and paying the City the amount of the City deposits. I think it is shown in this case that there was $535,000 worth of par value of securities held by the bank and they were returned to the City on the payment to the City of a far lesser amount than those securities represented.

In other words, it was an excellent thing for the bank itself to get back those pledged securities and to pay a much lesser sum than represented the City's account. All of this indicates that the bank acted voluntarily. No question about that. The transaction was consummated and here six years after this suit is brought.

As I say, it becomes a question of fact as to whether or not those were public funds or of such a nature as to be considered as public funds and, secondly, as to whether there was any undue payment received by reason of insolvency or by reason of any other claim as to why these moneys should be refunded. In that case of *McNair* v. *Knott*, Judge McReynolds in determining the case with a concurring opinion written by Mr. Justice Black, in his concurring opinion Judge McReynolds viewed the case like this where there had been this relationship between the parties and the matters had been consummated and gone through with, he said that it seemed to him that there was nothing to decide the case on without going into the question of power under Section 90.

I ask your Honor if you will read that case. Your Honor is inclined to reserve decision on this motion until we can submit those authorities. Perhaps it might help us if your Honor could give us that opportunity.

Mr. Moore: There was a question raised about the giving of notice this morning. You will notice that this action is not brought against the City of Yonkers. It is brought against the Trustees of the Firemen's Pension Fund of the City of Yonkers. There is no notice required, requiring us to give the City of Yonkers notice. No notice, I think, was given. I am not familiar with *McNair* v. *Knott*. I understand it is a recent case. The facts of it have never been brought to my attention. Mr. McAneny says it is not reported.

Mr. McAneny: It is reported, but not published in the printed volume.

The Court: The New York Court of Appeals?

Mr. McAneny: No, the Supreme Court.

Mr. Moore: I thought that we were going to submit briefs in this case, your Honor.

The Court: That is the way to do it, of course.

Mr. Moore: How long a time will you want?

The Court: What about the other suits?

Mr. Moore: I am prepared to go ahead with the next case.

Mr. McAneny: I ask the Court to make a finding in favor of the defendants.

The Court: I will withhold any action on this motion at this time.

Suppose you submit briefs on February 7th. You may send them to me at Buffalo at the Federal Courthouse.

Mr. McAneny: I assume that we will file separate briefs without the exchange of briefs and reply briefs.

Mr. Moore: Yes.

Plaintiff's Exhibit 1.

TREASURY DEPARTMENT

No. 653

Office of the Comptroller of the Currency

Washington, D. C., November 15, 1937.

WHEREAS, Arthur E. Muth was duly appointed and commissioned Receiver of "The First National Bank & Trust Company of Yonkers," located in the City of Yonkers, County of Westchester and State of New York on the twenty-third day of January, 1934, and whereas the said Arthur E. Muth has resigned to take effect at the close of business on November 15, 1937.

NOW, THEREFORE, I, William Prentiss, Jr., Acting Comptroller of the Currency, do hereby appoint Walter F. Downey Receiver of "The First National Bank & Trust Company of Yonkers" to take effect at the close of business on the fifteenth day of November, 1937, in place of the said Arthur E. Muth, with all the powers, duties, and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this fifteenth day of November, A. D., 1937.

WILLIAM PRENTISS, JR.
Acting Comptroller of the Currency.

(SEAL)

(Duly certified November 16, 1937.)

262

Plaintiff's Exhibit 2.

Proclamation.

(Seal of State)

State of New York

Executive Chamber

Until early this morning it was my hope that it would not be necessary to interrupt the continuous operation of
263 the banking system of New York State. The spread of hysteria and the restrictions imposed upon the banking facilities of the country through measures adopted in so many states have at last placed upon the New York banks a burden so great that it has finally rendered drastic action imperative here.

Therefore, at a meeting early this morning the Clearing House Committee of the New York Clearing House, with the advice and recommendation of the Federal Reserve Bank of New York, has asked me to proclaim a banking holiday lasting until the close of business, Monday, March 6th.

264 I make this proclamation with complete conviction that the best interests of the people of the State are being served thereby. This is a time for coolness and leadership. The people of this State and of the whole nation have shown a splendid spirit to date in meeting all the trying problems of the depression. I am confident that this spirit will be maintained.

The interval which this holiday affords should give responsible officials the necessary opportunity to consider the situation calmly and to prepare the way for an adjustment of our difficulties.

Now, therefore, I, Herbert H. Lehman, Governor of the State of New York, do hereby proclaim and set apart

Plaintiff's Exhibit 2.

Saturday, March 4th, and Monday, March 6th, as holidays on which all banking institutions will be closed.

GIVEN under my hand and the Privy Seal of the State at my residence, 820 Park Avenue, in the (SEAL) City of New York, this fourth day of March in the year of our Lord One Thousand nine hundred and thirty-three.

HERBERT H. LEHMAN

BY THE GOVERNOR:

JOSEPH J. CANAVAN
Secretary to the Governor

State of New York
Department of State
Filed Mar 4—1933

EDWARD J. FLYNN
Secretary of State

268

Plaintiff's Exhibit 3.

Proclamation.

(SEAL OF STATE)

STATE OF NEW YORK

Executive Chamber.

WHEREAS, a proclamation has been issued by the President of the United States declaring a bank holiday to and
269 including March ninth, one thousand nine hundred thirty-three;

NOW, THEREFORE, I, Herbert H. Lehman, Governor of the State of New York, do hereby declare that the bank holiday heretofore declared by me in the State of New York is extended to and including said March ninth, one thousand nine hundred thirty-three.

GIVEN under my hand at 820 Park Avenue in the City of New York and under the Privy Seal of
(SEAL) the State at the Capitol in the City of Albany this sixth day of March in the year of our Lord
270 one thousand nine hundred thirty-three.

HERBERT H. LEHMAN

BY THE GOVERNOR:

JOSEPH J. CANAVAN
Secretary to the Governor.

State of New York
Department of State
Filed Mar 11—1933

EDWARD J. FLYNN
Secretary of State

Plaintiff's Exhibit 4.

FIRST NATIONAL BANK AND TRUST COMPANY
YONKERS, N. Y.

Name ~~Police Pension Fund~~ City of Yonkers

Address c/o City Treasurer, City Hall, Yonkers, N. Y.

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
	Mar 2 '33	141.67—	125.00—					
	Mar 2 '33	141.67—	50.00—					
	Mar 2 '33	141.67—	50.00—					
	Mar 2 '33	125.00—	50.00—					
	Mar 2 '33	125.00—					Mar 2 '33	30,658.66*
30,658.66	Mar 2 '33	50.00—	50.00—					
	Mar 2 '33	166.67—					Mar 2 '33	30,391.99*
30,391.99	Mar 3 '33	50.00—	50.00—					
	Mar 3 '33	104.17—	87.50—					
	Mar 3 '33	87.50—	50.00—					
	Mar 3 '33	50.00—	50.00—					
	Mar 3 '33	141.67—	104.17—					
	Mar 3 '33	95.83—	50.00—					
	Mar 3 '33	50.00—					Mar 3 '33	29,421.15*
29,421.15	Mar 3 '33	50.00—	137.50—				Mar 3 '33	29,233.65*
29,233.65					Mar 3 '33	.02	Mar 3 '33	29,233.67*
29,233.67	Mar 10 '33	50.00—			Mar 10 '33		Mar 10 '33	29,183.67*
29,183.67	Mar 13 '33	50.00—					Mar 13 '33	29,133.67*
29,133.67	Mar 16 '33	166.67—	50.00—				Mar 16 '33	28,917.00*
28,917.00	Mar 17 '33	50.00—	50.00—					
	Mar 17 '33	50.00—					Mar 17 '33	28,767.00*
28,767.00	Mar 18 '33	50.00—	50.00—				Mar 18 '33	28,667.00*
28,667.00	Mar 20 '33	125.00—					Mar 20 '33	28,542.00*
28,542.00	Mar 20 '33	50.00—	58.33—					
	Mar 20 '33	50.00—					Mar 20 '33	28,383.61*
28,383.61	Mar 23 '33				Mar 20 '33		Mar 20 '33	28,383.67*
28,383.67	Mar 24 '33	50.00—	50.00—				Mar 24 '33	28,283.67*—
28,283.67	Mar 24 '33	137.50—					Mar 24 '33	28,146.17*—
28,146.17	Mar 24 '33	137.50—					Mar 29 '33	28,096.17*—
28,096.17	Mar 31 '33	166.67—	50.00—	50.00—			Mar 31 '33	27,829.50*—
27,829.50	Apr 1 '33	141.67—	104.17—	141.67—				
	Apr 1 '33	50.00—	87.50—	50.00—				
	Apr 1 '33	87.50—	125.00—	50.00—				
	Apr 1 '33	50.00—	87.50—	66.66—				
	Apr 1 '33	50.00—	95.83—	50.00—				
	Apr 1 '33	50.00—	166.67—	50.00—				
	Apr 1 '33	104.17—	68.75—	125.00—				
	Apr 1 '33	137.50—	50.00—	125.00—				
	Apr 1 '33	50.00—	50.00—	141.67—				
	Apr 1 '33	50.00—	125.00—	50.00—				
	Apr 1 '33	50.00—	50.00—				Apr 1 '33	25,148.24*—
25,148.24	Apr 3 '33	95.83—	50.00—	114.58—				
	Apr 3 '33	50.00—	50.00—	50.00—				
	Apr 3 '33	104.17—	104.17—	50.00—				
	Apr 3 '33	58.33—	50.00—	50.00—				
	Apr 3 '33	50.00—	50.00—	50.00—				
	Apr 3 '33	50.00—	50.00—	50.00—				
	Apr 3 '33	95.83—	50.00—	166.67—				
	Apr 3 '33	50.00—					Apr 3 '33	23,658.66*

Plaintiff's Exhibit 4.

FIRST NATIONAL BANK AND TRUST COMPANY
YONKERS, N. Y.

Name Police Pension Fund City of Yonkers
Address c/o City Treasurer, City Hall, Yonkers, N. Y.

Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
58.66	Apr 4 '33	50.00—	119.79—	50.00—				
	Apr 4 '33	50.00—	50.00—	125.00—				
	Apr 4 '33	50.00—					Apr 4 '33	23,163.87
63.87	Apr 5 '33	95.83—	50.00—	110.41—				
	Apr 5 '33	141.67—	141.67—	95.83—				
	Apr 5 '33	50.00—	72.91—	50.00—			Apr 5 '33	22,355.55
355.55	Apr 6 '33	166.67—	50.00—	50.00—				
	Apr 6 '33	104.17—					Apr 6 '33	21,984.71
984.71	Apr 7 '33	87.50—					Apr 7 '33	21,897.21
897.21	Apr 8 '33	50.00—					Apr 8 '33	21,847.21
847.21	Apr 10 '33	95.83—	50.00—				Apr 10 '33	21,701.38
701.38	Apr 11 '33	125.00—	125.00—				Apr 11 '33	21,451.38
451.38	Apr 15 '33	50.00—					Apr 15 '33	21,401.38
401.38	Apr 17 '33	137.50—					Apr 17 '33	21,263.88
263.88	Apr 24 '33	141.67—					Apr 24 '33	21,122.21
122.21	Apr 29 '33	50.00—					Apr 29 '33	21,072.21
072.21	May 1 '33	50.00—	50.00—	50.00—				
	May 1 '33	50.00—	95.83—	50.00—				
	May 1 '33	50.00—	125.00—	141.67—				
	May 1 '33	50.00—	125.00—	125.00—				
	May 1 '33	125.00—	166.67—	119.79—				
	May 1 '33	104.17—	68.75—	50.00—				
	May 1 '33	50.00—	50.00—	141.67—				
	May 1 '33	87.50—	50.00—	50.00—				
	May 1 '33	66.66—	50.00—	50.00—				
	May 1 '33	87.50—					May 1 '33	18,792.00
792.00	May 2 '33	125.00—	58.33—	95.83—				
	May 2 '33	95.83—	50.00—	114.58—				
	May 2 '33	50.00—	50.00—	95.83—				
	May 2 '33	141.67—	87.50—	141.67—				
	May 2 '33	50.00—	50.00—				May 2 '33	17,585.76
585.76	May 3 '33	166.67—	50.00—	50.00—				
	May 3 '33	72.91—	104.17—	50.00—				
	May 3 '33	15,242.45—	50.00—	137.50—				
	May 3 '33	125.00—	95.83—	50.00—				
	May 3 '33	110.41—	141.67—	137.50—				
	May 3 '33	50.00—	104.17—	50.00—			May 3 '33	797.48
797.48	May 4 '33	50.00—	50.00—	50.00—				
	May 4 '33	50.00—	50.00—	50.00—			May 4 '33	497.48
497.48	May 5 '33	166.67—	50.00—				May 5 '33	280.81
280.81	May 6 '33	50.00—					May 6, 33	230.81
230.81	May 9 '33	50.00—					May 9 '33	180.81
180.81	May 10 '33	104.17—					May 10 '33	76.64
76.64	May 15 '33	50.00—					May 15 '33	26.64
26.64	Jul 26 '33	1.64—					Jul 26 '33	25.00
25.00	Oct 26 '33	25.00—					Oct 26 '33	.00

FIRST NATIONAL BANK AND TRUST COMPANY
YONKERS, N. Y.

Name City of Yonkers, Police Pension Fund

Old Balance	Date	Checks in Detail			Date	New Balance

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Plaintiff's Exhibit 5.

Description of Assets Pledged	Face Value
State of Arkansas, 4½s, due 1942	$ 50,000.00
Butte, Montana, 6s, due 1941	15,000.00
Charlotte, North Carolina, 4½s, due 1934	5,000.00
Galveston, Texas, 5s, due 1933-1935	12,000.00
Town of Greenburgh, New York, 4½s, due 1946	15,000.00
Town of Greenburgh, New York, 4½s, due 1953	5,000.00
Town of Greenburgh, New York, 4½s, due 1954	1,000.00
Town of Huntington, Long Island, 4½s, due 1938	2,000.00
Town of Huntington, Long Island, 4½s, due 1945	2,000.00
Town of Huntington, Long Island, 4½s, due 1946	7,000.00
County of Jefferson, Alabama, 5s, due 1947	15,000.00
State of Louisiana, 4½s, 1973	10,000.00
State of Louisiana, 4½s, due 1953	5,000.00
New Orleans, 4½s, due 1956	5,000.00
City of New York, 4½s, due 1965	10,000.00
Norfolk, Virginia, 4½s, due 1935	10,000.00
Norfolk, Virginia, 4½s, due 1935	15,000.00
State of Oregon, 5½s, due 1937	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1946	2,500.00
City of Orlando, Florida, 5½s, due 1952	25,000.00
Portsmouth, Virginia, 5s, due 1954	10,000.00
City and County of San Francisco, 5s, due 1945	10,000.00

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280 *Defendants' Exhibit A*

Description of Assets Pledged	Face Value
Village of Sea Cliff, New York, 5s, due 1933	$ 1,000.00
State of South Dakota, 5s, due 1938	15,000.00
Winston-Salem, North Carolina, 4¾s, due 1936	14,000.00
Canadian, Int. Paper, 6s, due 1949	25,000.00
Comm. of Kentucky, 4½s, due 1950	50,000.00
Town of Lyndhurst, 5½s, due 1934	55,000.00
State of New Mexico, 6s, due 1935	25,000.00
Bay City, 4s, due 1935	3,000.00
281 Seattle, Washington, 5s, due 1934	6,000.00
Seattle, Washington, 5s, due 1940	2,000.00
Teaneck, New Jersey, 4½s, due 1934	25,000.00
Union, 6s, due 1934	25,000.00
Ohio Public Service, 6s, due 1953	30,000.00
South Bay Cons. Water Co., 5s, due 1950	10,000.00
Laclede Gas Light Co., 5½s, due 1935	5,000.00
Total Face Value	$535,000.00

Defendants' Exhibit A.

282

(Same as Plaintiff's Exhibit 5.)

Defendants' Exhibit B.

(FRONT)

CITY OF YONKERS, N. Y.

Warrant No. 170736 No. 64270

Yonkers, N. Y., Feb. 28, 1933.

50-53 WESTCHESTER TRUST COMPANY

Pay to the
order of POLICE PENSION FUND—YONKERS.....$27,447.76
City of Yonkers $27447 and 76 Cts.....Dollars

This check is payable through any member of the New York Clearing House without charge for exchange.

for P. P. Fund

Countersigned by

JAS. E. HUSHION
Comptroller

G. W. KLEIN JR.
Treasurer

CITY TREASURER'S OFFICE

(BACK)

[Perforation]

PAID
3.1.33
[Stamps]

Pay to the Order of
Any Bank, Banker or Trust Co.
Previous Endorsements Guaranteed
[FEB 28 33]

THE FIRST NATIONAL BANK & TRUST CO.
50-51 Yonkers, N. Y. 50-51

William J. Bright, Cashier.
Pay to the Order of
FIRST NATIONAL BANK
Account of
Police Pension Fund
City of Yonkers.

286

Defendants' Exhibit C.

Resolution of Board of Estimate and Apportionment of The City of Yonkers, adopted July 10, 1929.

By Mr. Davis:—

Resolved, That The First National Bank, Yonkers National Bank and Trust Company, Yonkers Trust Company, Westchester Trust Company, the Bryn-Mawr-Nepperhan National Bank and the Central National Bank be designated as banks and trust companies for the purpose of depositing all moneys of the city received by the City Treas-
287 urer of the City of Yonkers; and the City Treasurer is hereby directed to continue to procure adequate security for all moneys deposited by him in any or all of the depositories hereinbefore designated, securing and protecting the City of Yonkers against any loss of the moneys so deposited. The action of the City Treasurer in procuring interest upon the following moneys in the following accounts is hereby approved: On average daily balance of accounts known as General Accounts, two per cent (2%) to be paid semi-annually on the 30th day of June and the 31st day of December; Firemen's Pension Fund, three and one-half per cent (3½%); Police Pension Fund, three and one-
288 half per cent (3½%); Saunders Trade Fund, three per cent (3%). The interest on the last mentioned accounts to be paid semi-annually on the 30th day of June and the 31st day of December in each year.

Adopted by the following vote:

Ayes—Mayor Fogarty, Council President Davis, Comptroller Loehr, Corporation Counsel Laragh and City Engineer Sheridan.

(Certified February 20, 1936.)

289

Defendants' Exhibit D.

(Front)

The City of Yonkers, N. Y.

Department of Finance Bureau of Comptroller

To Police Pension Fund Dr.

Items	Amount
Police Pension Fund for year ended December 31, 1932	
Members' Contributions $18,298.51	290
City's Contribution (Local Law No. 1 (1931) Section 2) one and one-half (1½) times $18,298.51	$27,447.76
9,149.26	

To the Comptroller:

I hereby certify, That the merchandise, materials or articles enumerated in the above account have been received and the services specified performed; that the prices are reasonable and just; that they were necessary for, and have been, or will be, applied to the uses of this Department, *and I further certify that no part of said account amounting in the aggregate to $27,447.76 has been paid or satisfied and that said amount be charged to the appropriate account as indicated on the opposite side of this claim.* 291

Signed R. E. Marchand

Title of Office Deputy Comptroller

Yonkers, 1/4/33

292 *Defendants' Exhibit D.*

(BACK)

Warrant No. 176736

Claim No. 32307 Amount, $27,447.76

CLAIMANT

Police Pension Fund,
Address Yonkers, N. Y.

293

Account	Amount
Police Pension Fund	$27,447.76
1932	
Current Account	
Total	$27,447.76

Received for audit Jan 5 1933
Approved for payment 1/10/1933
Date of payment Feb 27 1933

MOREY
Auditor.

294

R. E. MARCHAND
Deputy Comptroller.

Defendants' Exhibit E.

Receipts for Bonds Surrendered.

March 28, 1933

Received from the Treasurer of the City of Yonkers the following bonds:

15,000.	County of Jefferson 5s, 1947	11,250.
10,000.	State of Louisiana 4¾s—1973	7,500.
5,000.	" " 4½s—1953	4,000.
25,000.	City of Orlando, Fla. 5½s—1952	12,000.
25,000.	Canadian International Paper 6s—1949	5,250.
25,000.	Teaneck, N. J. 5½s—1934	17,500.
30,000.	Ohio Public Service 1953	24,000.
10,000.	South Bay Consolidated Water Co. 5s —1950	6,000.
5,000.	Laclede Gas Light Co. 5½s—35	2,400.
5,000.	New Orleans 4½s—1956	4,250.
15,000.	Butte, Montana 6s—41	11,250.
10,000.	Portsmouth, Va. 5s—54	7,700.
7,000.	Town of Huntington, L. I. 4½s—1946	5,915.
10,000.	Norfolk, Va. 4½s—1935	9,400.
197,000.		128,415.

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator

FIRST NATIONAL BANK & TRUST CO.,
Yonkers, N. Y.

298 *Defendants' Exhibit E.*

April 3rd, 1933

Received from the Treasurer of the City of Yonkers the following Bonds:

$50,000.	State of Arkansas	4½	1942	37	$ 18,500.
55,000.	Town of Lyndhurst	5½		60	33,000.
50,000.	Commonwealth of Kentucky	4½		80	40,000.
14,000.	Winston-Salem, N. C.	4¾		90	12,600.
15,000.	State of South Dakota	5		89½	13,425.
3,000.	Bay City	4		80	2,400
5,000.	Town of Greenburgh	4½	1953	81.5	4,075.
299 1,000	" " "	4½	1954	18¼	812.50
					$124,812.50

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator.

FIRST NATIONAL BANK & TRUST CO.
Yonkers, N. Y.

April 7, 1933

300 Received from the Treasurer of the City of Yonkers, the following bonds:

$15,000.	Norfolk, Va. 4½s—1935	@	94	14,100.
25,000.	Union, N. J. 6s—1934	@	80	20,000.
40,000.				34,100.

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU, Conservator.

Defendants' Exhibit E. 301

May 4, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

5,000.	City of Charlotte, N. C. 4½s due 1934
12,000.	Galveston, Texas 5s—1933-5
15,000.	Town of Greenburgh, N. Y. 4½s—1946
2,000.	Town of Huntington, L. I. 4½s—1938
2,000.	" " " 4½s—1945
10,000.	City of New York 4½s—1965
2,500.	State of Oregon 5½s—1938
2,500.	" " 5½s—1945
2,500.	" " 5½s—1945
2,500.	" " 5½s—1946
1,000.	Village of Sea Cliff, N. Y. 5s—1933
25,000.	State of New Mexico 6s—1935
6,000.	Seattle, Wash., 5s—1934
2,000.	" " 5s—1940

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said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO. 303

PERCIVAL W. TRUDEAU, Conservator.

304 *Defendants' Exhibit E.*

May 16, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

$10,000. City & County of San Francisco, school bonds 5s of 1945

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers,

305 PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU, Conservator.

Yonkers, N. Y., July 20, 1933

RECEIVED, from the Treasurer of the City of Yonkers the following bonds:

$2,000 Oregon State Highway 5½% bonds due Oct. 1, 1937; Nos. 5034 and 5035 $1,000 each

306 1,000 Oregon State Highway 5½% bond due Oct. 1, 1938; No. 5110 and

1,000 Oregon State Highway 5½% Bond due April 1938; No. 5072

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU, Conservator.

307

Defendants' Exhibit F.

Extract from Annual Budget, Yonkers, 1931.

Extract from Annual Budget, City of Yonkers.
Itemized Statement of Expenditures for 1931.

• • • •

26. Miscellaneous:
Contribution to Police Pension Fund, $27,625.02.

308

Defendants' Exhibit G.

Extract from Annual Budget, Yonkers, 1932.

Extract from Annual Budget, City of Yonkers.
Annual Estimate of 1932 Summary Statement.
Expenditures, Administration and Maintenance,

• • • •

26. Other Administrative Expenditures:
Contributions to Police Pension Fund, $28,330.13.

309

Defendants' Exhibit H.

Extract from Annual Budget, Yonkers, 1933.

Extract from Annual Budget, City of Yonkers.
Annual Estimate of 1933 Summary Statement.
Expenditures, Administration and Maintenance.

• • • •

28. Other Administrative Expenditures:
Contributions to Police Pension Fund, $28,527.36.

310

Findings of Fact.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

311

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

312

This cause having duly come on to be tried by the Court without a Jury, and the allegations and proofs of the parties having been fully heard, I find and decide as follows:

1. The defendants constitute the Board of Trustees of the Police Pension Fund of the City of Yonkers and have the care, control and management of the fund.

2. On March 4, 1933 the defendants had on deposit in The First National Bank and Trust Company of Yonkers in a checking account captioned "Police Pension Fund City of Yonkers" the sum of $29,233.67, and in a checking account captioned "City of Yonkers Police Pension Fund" the sum of $50.00. The bank has since September 30, 1929

been a national banking corporation organized and existing under the laws of the United States with its principal place of business in the City of Yonkers, County of Westchester and State of New York.

3. The sources of the Police Pension Fund, as fixed by statute and local law, are rewards, gifts, fines, salary deductions and contributions from the City of Yonkers.

4. The purposes of the fund are to pay pensions to retired department members or their next of kin and to pay premiums on group life insurance policies covering the 314
lives of department members.

5. On March 4, 1933 the Governor of the State of New York proclaimed a bank holiday and the bank did not open for business that day and never afterwards reopened for regular business.

6. On March 6, 1933 the President of the United States proclaimed a bank holiday and on March 9, 1933 the bank holiday was extended by further proclamation of the President.

7. The Comptroller of the Currency, pursuant to statute, appointed a Conservator of the Bank on March 20, 1933 315
and appointed a successor Conservator on July 24, 1933. On January 23, 1934 a Receiver was appointed to liquidate the Bank and the plaintiff was appointed successor to such Receiver on November 15, 1937.

8. On July 10, 1929 the Board of Estimate and Apportionment of the City of Yonkers, consisting of the Mayor, the Common Council President, the Comptroller, the Corporation Counsel and the City Engineer, passed a resolution designating five several banks as depositories "for all moneys of the City received by the City Treasurer" and directing the City Treasurer to "continue to procure adequate security for all moneys deposited by him" in the designated depositories.

9. On September 30, 1929 three of the depositories referred to in the resolution were merged under the name The First National Bank and Trust Company of Yonkers.

10. On March 4, 1933 the Bank had on deposit with the City as security for the aforesaid accounts and for city deposits bonds having a par value of $535,000.

11. The balance of $29,283.67 in the accounts on March 4, 1933 was paid out in various amounts between March 10, 1933 and October 26, 1933.

12. Between March 29, 1933 and July 20, 1933 the City returned to the Bank the pledged securities to the amount of $534,000 and retained bonds of the par value of $1,000.

13. The Conservator gave receipts for the returned bonds reciting therein "said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers."

14. A first dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 3, 1937.

15. No statute of the state of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

16. No statute of the state of New York confers upon state banks the specific power to pledge assets to secure deposits of the City of Yonkers.

17. No applicable ordinance or local law of the City of Yonkers confers upon any bank the power to secure the deposits of the City of Yonkers.

18. Under the common law of the state of New York, as declared by its highest court, state banks lack the power

to pledge assets to secure deposits of political subdivisions of the state.

19. That the pledge of assets by the bank to secure the deposits in the accounts of the Police Pension Fund City of Yonkers and City of Yonkers Police Pension Fund was illegal and *ultra vires.*

20. That the Bank was insolvent as of the 6th day of March, 1933 and that the rights of the general creditors of the Bank became fixed as of March 6, 1933.

21. That the payments to the defendants from the de- 320
posit accounts Police Pension Fund City of Yonkers and City of Yonkers Police Pension Fund were made with a view to the preference of the defendants over other creditors of the Bank.

22. That no service of any notice of claim or of intention to sue by the Bank through its Receiver was required.

23. That the payments from the Police Pension Fund City of Yonkers deposit account and City of Yonkers Police Pension Fund deposit account to the defendants were voluntarily made under a mistake of law but are nevertheless recoverable.

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24. Plaintiff is entitled to recover the sum of $14,641.84, being the difference between the amount which the defendants should have received under the 50% dividend paid by the Bank and the sum of $29,283.67 paid to the defendants, together with interest and the costs of this action.

25. The plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $17,570.20 from May 1, 1936 to November 2, 1937 and interest at the same rate on the sum of $14,641.84 from November 3, 1937 to the date of the judgment to be entered herein.

Dated, July 18, 1938.

JOHN KNIGHT
District Judge

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Defendants' Requests for Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

323 Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

324

Come now the above named defendants by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, their attorney, and considering the same to be material to the proper presentation of this case, respectfully request the Court to make and enter the following findings of fact and conclusions of law.

FINDINGS OF FACT.

1. That The First National Bank and Trust Company of Yonkers was and is for all purposes of this action a

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National Banking Institution organized and existing under and by virtue of the laws of the United States of America, having its only place of business in the City of Yonkers, State of New York.

2. That the City of Yonkers was and still is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

3. That the defendants, Joseph F. Loehr, James J. Hushion and Dennis M. Morrissey are the Mayor, Comptroller and Commissioner of Public Safety of the City of Yonkers, New York, respectively, and have since the 1st day of January, 1932, constituted the Board of Trustees of the Police Pension Fund of the City of Yonkers, having the care, control and management of said fund.

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4. That previous laws of the State of New York and of the City of Yonkers in relation to the Police Pension Fund of the City of Yonkers were superseded and amended by Local Law number 1-1931 of the City of Yonkers, which provides as follows:

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"CITY OF YONKERS

LOCAL LAW No. 1—(1931)

A LOCAL LAW OF THE CITY OF YONKERS TO AMEND AND SUPERSEDE ARTICLE XI POLICE PENSION FUND OF THE SUPPLEMENTAL CHARTER OF SAID CITY, CONTAINED IN CHAPTER 452 OF THE LAWS OF 1908, AS AMENDED, ENTITLED 'AN ACT TO SUPPLEMENT THE GENERAL LAWS RELATING TO THE GOVERNMENT OF THE CITY OF YONKERS, AND TO REVISE AND CONSOLIDATE THE LOCAL LAWS RELATING THERETO.'"

328 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

Be it enacted by the Common Council of the City Yonkers, as follows:—

Section 1. Article XI, Police Pension Fund of the Supplemental Charter of the City of Yonkers, N. Y., being part of Chapter 452 of the Laws of 1908 as amended, entitled 'An act to supplement the general laws relating to the government of the City of Yonkers, and to revise and consolidate the local laws relating thereto,' is hereby amended and superseded
329 to read as follows:

Section 1. The Mayor, the Comptroller and the Commissioner of Public Safety and their successors in office, shall constitute a board of trustees of the Police Pension Fund; and they shall have the care, control, management and distribution of said funds as provided by law. The Comptroller shall be the custodian of the said fund, and the City Treasurer shall be the treasurer thereof. All orders made payable from the said fund shall be made upon the vote of said trustees, and such orders must be signed by the Commissioner of Public Safety, and countersigned by the Comptroller and by the City Treas-
330 urer. The trustees of the said fund shall invest for the benefit of the fund all moneys not necessary for the payment of pension, as hereinafter provided. Such investment shall be made only in securities in which the savings banks of the State of New York are authorized by law to invest. In addition to and as part of the pensions hereinafter specified, the said trustees are directed to cause group life insurance policies in sum of One Thousand Dollars per member to be issued upon the life of such member while employed in such service and until retirement there-

from and to pay out of said fund the premiums due thereon, provided the beneficiary named in said policies shall be limited to the widow, minor children under 18 years of age, or next of kin, of such member. The trustees of the said fund shall report in detail to the Common Council annually in the month of January, the condition and the disposition of the fund, and the items of receipts and disbursements for account of the same during the year ending on the thirty-first day of the December preceding, including insurance policies then outstanding. 332

Section 2. The police pension fund as it now exists is continued; and in addition to the moneys and investments therein contained it shall consist of:

1. All fines imposed by the Commissioner of Public Safety on the members of the Police Department in the City of Yonkers.

2. All rewards, money, gifts, testimonials and emoluments that may be paid or given to any member of the Police Department, for account of police service, except such payments or gifts as have been or shall be allowed by the Commissioner of Public Safety to be retained by the members receiving the same. 333

3. All money, pay, compensation or salary or any part thereof deducted or withheld from any member or members of the Police Department, for or on account of absence or suspension from duty except in cases of sickness.

4. All lost or stolen money remaining in the hands of the police for the period of one year and for which there shall be no lawful claimant; and the

moneys arising from the sale of unclaimed property, which property the Commissioner of Public Safety is hereby authorized to sell, after it shall have been without a lawful claimant for the period of one year.

5. All fees received and paid for the inspection and testing by the police of combustibles and dangerous material, as shall be provided by the laws and ordinances of the City.

335 6. All moneys which shall be deducted from the monthly pay, salary or compensation of each member of said department and which shall be the sum of two per centum of the monthly pay, salary or compensation of each of the said members; which said sum shall be deducted monthly by the Comptroller of the City of Yonkers from the pay, salary or compensation of each and every member of said Police Department. And the Comptroller is hereby authorized, empowered and directed to deduct the said two per centum of the monthly pay, salary or compensation as aforesaid, and to cause the same to be paid forthwith to the trustees of the said Police Pension
336 Fund.

7. An amount payable to the trustees of the Police Pension Fund out of the City treasury at the end of each fiscal year equivalent to one and one-half times the amount of moneys deducted from the monthly pay, salary, or compensation of each member of said Police Department during such year, as provided by subdivision six of this section.

Whenever, in any calendar year the disbursements from said fund shall exceed the total income thereof, and the principal sum of said fund is less than $450,000.00 there shall be included in the next annual

budget and levy a sum to equal the amount of such deficiency for such previous year, and same paid to the trustees of said fund.

Section 3. RETIREMENTS. The Commissioner of Public Safety shall have the power and authority to retire from all service in the Police Department and relieve and dismiss from the said Department any member or officer of the Department who, upon an examination by the Police Surgeon ordered by the said Commissioner, is found to be disqualified physi- 338
cally or mentally in the performance of his duties.

The Commissioner of Public Safety shall retire from all service in the Police Department and relieve and dismiss from the said department, members or officers thereof in the following cases:

(a) Notwithstanding the provisions of Section 136, Second Class Cities Law, Chapter 55, Laws of 1909, as amended, the Commissioner of Public Safety is hereby directed to retire from all service in the Police Department, any member or officer attaining the age of sixty-four years and it is the pur- 339
pose of this provision to retire the said member by operation of law and not by the exercise of any discretion on the part of the Commissioner of Public Safety. The record of the Department of Public Safety as to the age of the various members and officers supplied to the said Department at the time of the appointment of the said member shall be controlling as to his age.

(b) Any member or officer of the Department, regardless of the age of the said member, who shall have served continuously as a member or officer of the Department for a period of twenty-five years at

the time of his application for retirement, provided that such member or officer applies for retirement. Nothing in this section contained shall, however, be construed as a limitation on the powers otherwise conferred by law with respect to the removal or dismissal of members or officers of the Police Department. No refunds for salary deductions shall be made to members dismissed from said force, or to any member who resigns before being entitled to a pension hereunder.

Section 4. The said board of trustees shall grant pensions out of said pension fund, in the following cases:

1. To any member or officer of the Police Department who shall have been retired for disability and who has been relieved and dismissed from the Police Department and who has been placed on the pension roll, as provided in section three of this article, an annual pension payable monthly during his lifetime of a sum of money amounting to one-half of the full salary or compensation received by such member or officer at the date of his retirement from service; and said pension or allowance so allowed is to be in lieu of any salary which such member or officer was entitled to receive at the date of his being so relieved or retired from duty and the City shall not be held liable for any payment of any claim or demand for service thereafter rendered by the member or officer of the force so retired.

2. To the widow of any member of the police force who shall have been killed while in the actual performance of police duty, or who shall have died from the effects of any injuries received in the actual

discharge of such duty one half of the annual salary of such member at time of death, payable to said widow during her lifetime, unless she remarries when said pension is to terminate.

To the widow of any such member, who has died, or shall hereafter die after three months of service on said police force, a sum not exceeding six hundred dollars per year, during widowhood. If there be no widow then the sum of $600.00 shall be paid to the child or children of such member until such child or children arrives at the age of eighteen years, when such pension is to terminate as to each child. If there be no widow or child or children under the said age of eighteen years, then the said sum of $600.00 shall be paid to the next of kin of such deceased member, said sum to be paid thereafter to such next of kin for one half the number of years of service to the credit of such deceased member.

To the widow of such member, who shall have been retired on a pension, or who shall hereafter be retired on a pension, a sum not exceeding six hundred dollars per year, during widowhood. If there be no widow then the said sum of $600.00 shall be paid to the child or children of such member until such child or children arrives at the age of eighteen years, when such pension is to terminate, as to each child. If there be no widow or child or children under said age of eighteen years, then said sum of $600.00 shall be paid to dependent parent, for one half the number of years of service to the credit of such deceased member.

3. Pensions to widows shall terminate when the widow shall remarry, and pensions to children shall

346 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

terminate whenever the children shall respectively arrive at the age of eighteen years.

No pension shall be paid except from the Police Pension Fund, nor shall a pension be paid to any other than members of the said department whose salaries shall or shall have contributed to the maintenance of the Police Pension Fund or their relatives as specified in the preceding section, nor shall a pension be awarded or granted on account of physical
347 or mental disability or disease where the disability or disease is caused by the culpable negligence or misconduct of the disabled or diseased party.

4. The said trustees are authorized to increase existing $300.00 pension to widows and children under eighteen years of age of deceased members to a sum not exceeding $600.00 to take effect from the time of granting such increase to such widow or children.

5. Every person who knowingly or wilfully in anywise procures the making or presentation of any
348 false or fraudulent affidavit or affirmation concerning any claim for pension or payment thereof, shall be in every such case forfeit a sum not exceeding two hundred and fifty dollars to be sued and recovered by and in the name of said trustee of said Police Pension Fund and when recovered paid over to and thereupon become a part of said Police Pension Fund.

6. For the purpose of this act the board of trustees of said Police Pension Fund is hereby authorized to administer oaths and take acknowledgements;

and any person who shall wilfully swear falsely in any oath or affirmation in obtaining or procuring any pension under the provisions of this act shall be guilty of perjury. The Comptroller is authorized to require sworn proof of beneficiary's identity before delivery of any pension check hereunder.

7. Moneys, securities and effects of said Police Pension Fund and all pensions granted and payable from said fund shall be and are hereby exempt from execution and from all process and proceedings to 350
enjoin and recover the same by or on behalf of any creditor or pension having or assisting any claim against or debt or liability of any pensioner of said fund.

8. The members of said Police Department whose salaries contribute to said pension fund shall annually select two of their members and the pensioners shall annually select one of their members; and the persons so selected shall constitute an auditing committee and shall audit the accounts and proceedings of the said trustees and make and file with the Clerk of the City of Yonkers a written report. 351

Section 5. In case any part of this act is declared invalid the remaining part shall continue in full force and virtue.

Section 6. Article XI, Police Pension Fund incorporated in Supplemental Charter as part of Chapter 452, Laws of 1908, is hereby superseded.

Section 7. This Local Law shall take effect as prescribed by the City Home Rule Law.

352 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

Adopted by the Common Council at a stated meeting held November 10th, 1931, by a vote of ten to one.

JOHN S. DAVIS
President of the Common Council.

Attest:

JOHN S. KETTELL
City Clerk

353 Approved November 23, 1931.

JOHN J. FOGARTY
Mayor.

5. That by a resolution adopted by the Board of Estimate and Apportionment of the City of Yonkers on July 10, 1929, certain banks were designated as depositaries for all moneys of the City deposited by the City Treasurer and the City Treasurer was directed to "continue to procure adequate security for all moneys deposited by him" in the designated depositaries.

354 6. That on March 4, 1933, The First National Bank and Trust Company of Yonkers, the successor by merger to three of the depositaries designated in the resolution of the Board of Estimate and Apportionment of Yonkers of July 10, 1929, had on pledge with the City of Yonkers, bonds of the par value of $535,000 which had been procured by the City Treasurer of the City of Yonkers pursuant to said resolution of July 10, 1929, from time to time prior thereto to secure, among other deposits, deposits of the defendants made by said City Treasurer, in the accounts, to wit: "Police Pension Fund, City of Yonkers", $29,233.67; and "City of Yonkers, Police Pension Fund", $50.

Defendants' Requests for Findings of Fact and Conclusions of Law. 355

7. That on March 4, 1933, the defendants had on deposit in The First National Bank and Trust Company of Yonkers moneys in the accounts and sums as follows: "Police Pension Fund, City of Yonkers," $29,233.67; and "City of Yonkers, Police Pension Fund", $50.

8. That the moneys on deposit in The First National Bank and Trust Company of Yonkers in the accounts "Police Pension Fund, City of Yonkers" in the sum of $29,233.67, and "City of Yonkers, Police Pension Fund" in the sum of $50, were public funds. 356

9. That on Saturday, March 4, 1933, the Governor of the State of New York issued a Proclamation declaring a banking holiday.

10. That the Governor's Proclamation of March 4, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

11. That The First National Bank and Trust Company was solvent on March 4, 1933.

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12. That on Monday, March 6, 1933, the President of the United States issued a Proclamation declaring a banking holiday until March 9, 1933.

13. That the President's Proclamation of March 6, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

14. That The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

358 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

15. That on March 9, 1933, the President of the United States issued a Proclamation continuing the Proclamation of March 6, 1933, until further proclamation by the President.

16. That the President's Proclamation of March 9, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

17. That The First National Bank and Trust Company
359 of Yonkers was solvent on March 9, 1933.

18. That on March 20, 1933, pursuant to Bank Conservation Act of March 9, 1933, the Comptroller of the Currency appointed Percival W. Trudeau Conservator of The First National Bank and Trust Company of Yonkers.

19. That The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

20. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers was
360 under the management and control of its own officers.

21. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company was permitted to transact such business as any other bank was permitted to transact under the Presidential Proclamations of March 6, and 9, 1933.

22. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers had the right to make payments on account of pension checks drawn against funds deposited prior to March 4, 1933.

Defendants' Requests for Findings of Fact and Conclusions of Law.

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23. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers paid out of the funds deposited prior to March 4, 1933, in the account "Police Pension Fund, City of Yonkers" the sum of $850 upon pension checks issued by the defendants and signed by the Comptroller and by the Treasurer of the City of Yonkers, such payments having been made in the following amounts on the following dates, respectively:

March 10, 1933	$ 50.00
March 13, 1933	50.00
March 16, 1933	216.67
March 17, 1933	150.00
March 18, 1933	100.00
March 20, 1933	283.33

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24. That on March 28, 1933, Percival W. Trudeau, in consideration (1) of the defendants' releasing their lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City, (2) of the defendants' not foreclosing their said lien in the State Courts, (3) of the City's surrendering the said assets so deposited, agreed with the defendants that he would pay out the funds of the defendants remaining on deposit with The First National Bank and Trust Company provided the City would return the bonds deposited with the City as security as the funds were paid out.

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25. That from March 21, 1933, to March 28, 1933, The First National Bank and Trust Company of Yonkers by and with the consent of Percival W. Trudeau, Conservator, paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Police Pension Fund, City of Yonkers" the sum of $237.50 upon pension checks issued by the defendants and signed by the Comptroller and by

the Treasurer of the City of Yonkers, such payments having been made on March 24, 1933.

26. That on March 28, 1933, pursuant to the said agreement between Percival W. Trudeau and the defendants, the City of Yonkers in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for the defendants' deposits, of the par value of $197,000.

27. That on July 24, 1933, Louis B. Rossire was appointed successor Conservator by the Comptroller of the Currency; that on January 23, 1934, the Comptroller of the Currency appointed Arthur E. Muth as Receiver of The First National Bank and Trust Company of Yonkers and on November 15, 1937, the said Comptroller appointed Walter F. Downey, plaintiff herein successor Receiver.

28. That from March 29, 1933, to January 23, 1934, The First National Bank and Trust Company of Yonkers, by and with the consent of Percival W. Trudeau, Conservator, and Louis B. Rossire, successor Conservator, voluntarily paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Police Pension Fund, City of Yonkers", the sum of $28,146.17 upon pension checks issued by the defendants and signed by the Comptroller and by the Treasurer of the City of Yonkers, such payments having been made in the following amounts on the following dates, respectively:

March 29, 1933	$ 50.00
March 30, 1933	266.67
April 1, 1933	2,681.26

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April	3, 1933	1,489.58
April	4, 1933	494.79
April	5, 1933	808.32
April	6, 1933	370.84
April	7, 1933	87.50
April	8, 1933	50.00
April	10, 1933	145.83
April	11, 1933	250.00
April	15, 1933	50.00
April	17, 1933	137.50
April	24, 1933	141.67
April	29, 1933	50.00
May	1, 1933	2,280.21
May	2, 1933	1,206.24
May	3, 1933	16,788.28
May	4, 1933	300.00
May	5, 1933	216.67
May	6, 1933	50.00
May	9, 1933	50.00
May	10, 1933	104.17
May	15, 1933	50.00
July	26, 1933	1.64
October	26, 1933	25.00

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except that one check dated May 2, 1933, in the sum of $15,242.45 was not a pension check but represented the balance of the account on that date which was withdrawn and deposited in a new Police Pension Fund account in the Yonkers National Bank and Trust Company.

29. That the moneys paid out of the account "Police Pension Fund, City of Yonkers" by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

370 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

30. That on October 26, 1933, The First National Bank and Trust Company of Yonkers, by and with the consent of Louis B. Rossire, successor Conservator, voluntarily paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "City of Yonkers, Police Pension Fund" the sum of $50.00 upon a pension check issued by the defendants and signed by the Comptroller and by the Treasurer of the City of Yonkers.

371 31. That the moneys paid out of the account "City of Yonkers, Police Pension Fund" by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

32. That between March 29, 1933, and January 23, 1934, pursuant to the said agreement between Percival W. Trudeau and the defendants, the City of Yonkers, in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for defendants deposits, of the par value of $337,000 on the dates and in
372 the amounts as follows:

April 3, 1933	$193,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

leaving $1,000 of said bonds in the hands of the City of Yonkers.

33. That Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, gave

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receipts to the City of Yonkers for the securities upon their surrender, each of which receipts contained the following provision:

> "Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers".

34. That on December 16, 1933, a first dividend of 40 per cent. and on November 3, 1937, a second dividend of 10 per cent. were made available to unsecured depositors of The First National Bank and Trust Company of Yonkers. 374

35. That the defendants were secured depositors to the extent of deposits in the account "Police Pension Fund, City of Yonkers" in the sum of $29,233.67.

36. That the defendants were secured depositors to the extent of deposits in the account "City of Yonkers, Police Pension Fund" in the sum of $50.

37. That the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company deposited with the City of Yonkers as security for their deposits. 375

38. That no claim was ever filed with the City of Yonkers, or any officer thereof, for the claim alleged in the complaint herein.

39. That no notice of claim and no notice of intention to sue was ever filed with the City of Yonkers, or any officer thereof, with respect to the claim alleged in the complaint herein.

40. That The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

41. That all of the moneys paid by The First National Bank and Trust Company of Yonkers to the defendants out of the accounts "Police Pension Fund, City of Yonkers" and "City of Yonkers, Police Pension Fund" were paid while said bank was solvent.

42. That no demand was ever made upon the defendants, the City of Yonkers, its officers or employees for the return of any of the money sued for herein.

43. That the Treasurer of the City of Yonkers is and was a person receiving and depositing moneys belonging to the State of New York.

44. That all acts found to have been done herein by the City of Yonkers were done by it on behalf of and as agent for the defendants.

CONCLUSIONS OF LAW.

1. That the defendants are entitled to judgment dismissing the complaint with costs.

2. That the City of Yonkers was and is a political subdivision of the State of New York, and was and is a city of the Second Class under Chapter 55 of the Laws of 1909 of New York as amended.

3. That the funds deposited by the defendants in the First National Bank and Trust Company of Yonkers in accounts, "Police Pension Fund, City of Yonkers", in the

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sum of $29,233.67, and "City of Yonkers, Police Pension Fund", in the sum of $50.00 were public funds.

4. That the Proclamation of the Governor of New York of March 4, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

5. That the Proclamation of the President of the United States of March 6, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

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6. That the Proclamation of the President of the United States of March 9, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

7. That the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

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8. That the appointment of Louis D. Rossire, as successor Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

9. That solvency is presumed until the contrary is proved.

10. That The First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

382 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

11. That the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to March 20, 1933.

12. That the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

13. That the plaintiff is not entitled to recover deposits of the defendants paid out by The First National Bank and
383 Trust Company of Yonkers prior to its insolvency.

14. That the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

15. That the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to March 20, 1933.

16. That the plaintiff has failed to prove a cause of
384 action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to January 23, 1934.

17. That a conservator of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

18. That a conservator of a national bank appointed by the Comptroller of the Currency is not an officer of the Court.

Defendants' Requests for Findings of Fact and Conclusions of Law.

19. That a receiver of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

20. That a receiver of a national bank appointed by the Comptroller of the Currency is not an officer of the Court.

21. That the negotiation of a settlement of claims against the First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same was within the scope of the authority of Percival W. Trudeau, as Conservator of said bank.

22. That the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants was based upon a good and valid consideration.

23. That the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants constituted an accord and satisfaction.

24. That the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency.

25. That National Banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

388 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

26. That the validity, force and effect of the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants is determined by the laws of New York, the place of making.

27. That the defendants were entitled to a preference in the payment of their funds upon liquidation of The First National Bank and Trust Company of Yonkers.

389 28. That under the law of the State of New York state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions hereof, in such banks.

29. That The First National Bank and Trust Company was authorized by law to give security for the safekeeping and prompt payment of public funds deposited with it by the defendants.

30. That The First National Bank and Trust Company
390 of Yonkers' depositing assets with the City of Yonkers as security for the defendants' deposits of public funds was lawful.

31. That the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among other deposits, deposits by the defendants in the accounts, "Police Pension Fund, City of Yonkers", in the sum of $29,233.67, and "City of Yonkers, Police Pension Fund" in the sum of $50.00 was lawful.

32. That the defendants were secured depositors of The First National Bank and Trust Company of Yonkers.

Defendants' Requests for Findings of Fact and Conclusions of Law.

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33. That if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with the City of Yonkers should serve as security for all of said City's deposits was beyond the powers of the said Bank, the rights and obligations of the plaintiff and defendant arising therefrom are determined by the laws of the State of New York.

34. That in order to repossess itself of the assets, given to secure the deposits of the defendants, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to defendants.

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35. That the payments of deposits between March 4, 1933, and March 20, 1933, to the defendants by The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

36. That the payment of deposits between March 20, 1933, and March 28, 1933, to the defendants by the Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

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37. That the payment of deposits between March 28, 1933, and January 23, 1934, to the defendants by the Conservator and successor Conservator of The First National Bank and Trust Company of Yonkers were "permitted"

394 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

38. That the defendants were creditors of The First National Bank and Trust Company of Yonkers.

39. That the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as
395 security for the indebtedness.

40. That the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City of Yonkers as security for the deposits of the defendants.

41. That this action was not commenced within the time limited by law.

42. That the City of Yonkers is prohibited by law from paying the claim alleged in the complaint.

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43. That the City of Yonkers is prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the claimant, and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller, and shall have been audited and allowed by him.

44. That the City of Yonkers is not liable in a civil action for damages or injuries to person or property, or invasion of personal or property rights, of any name or nature whatsoever, arising at law or in equity, alleged to

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have been caused or sustained by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the City, or any of its agents, officers or employees, unless a claim therefor in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or on account of which the claim arose, be presented to the common council and served upon the Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall be commenced thereon within one year after the happening of such accident or injury or the occurrence of such act, omission, fault or neglect.

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In the event of a denial by the Court of defendants' requests for the foregoing findings of fact and conclusions of law or any part thereof, defendants respectfully request the Court to grant an exception or exceptions to defendants.

Dated: Yonkers, N. Y., July , 1938.

Respectfully submitted,

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LEONARD G. MCANENY,
Attorney for Defendants.

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Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

401

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

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Appearances:

BENJAMIN W. MOORE, Yonkers, N. Y., for Plaintiff.

LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y.; and MORRIS L. ROSENWASSER and HAROLD T. GARRITY, of Counsel; for Defendant.

KNIGHT, District Judge:

The Court finds with respect to the Defendant's Findings of Fact and concludes as to the Conclusions of Law submitted in this case as follows:

Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law. 403

FINDINGS OF FACT.

1. Found.
2. Found.
3. Found.
4. Found, except as to section 3 *et seq.*
5. Found.
6. Found.
7. Found.
8. Refused.
9. Found. 404
10. Found.
11. Refused.
12. Found.
13. Refused.
14. Refused.
15. Found.
16. Refused.
17. Refused.
18. Found.
19. Refused.
20. Refused.
21. Refused. 405
22. Refused.
23. Found if amended to show that payment of March 20, 1933, was by the Conservator.
24. Refused.
25. Found.
26. Refused.
27. Found.
28. Found, except amended to show payment as of March 30, 1933, was as of March 31, 1933.
29. Refused.
30. Found.

406 *Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law.*

31. Refused.
32. Refused.
33. Found.
34. Found.
35. Refused.
36. Refused.
37. Refused.
38. Found.
39. Found.
40. Refused.
407 41. Refused.
42. Found.
43. Refused.
44. Refused.

CONCLUSIONS OF LAW.

1. Refused.
2. Found.
3. Refused.
4. Found.
5. Found.
408 6. Found.
7. Refused.
8. Refused.
9. Refused.
10. Refused.
11. Refused.
12. Refused.
13. Refused.
14. Refused.
15. Refused.
16. Refused.
17. Found
18. Found.

Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law.

19. Found.
20. Found.
21. Refused.
22. Refused.
23. Refused.
24. Refused.
25. Refused.
26. Refused.
27. Refused.
28. Refused.
29. Refused.
30. Refused.
31. Refused.
32. Refused.
33. Refused.
34. Refused.
35. Refused.
36. Refused.
37. Refused.
38. Found.
39. Refused.
40. Refused.
41. Refused.
42. Refused.
43. Refused.
44. Refused.

July 18, 1938.

JOHN KNIGHT
United States District Judge

Filed July 29, 1938

412 **Defendants' Exceptions.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

413 *against*

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

414 Exceptions are allowed the defendants as noted in the stenographic minutes of the trial herein, and to the findings numbered 5, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 contained in the findings of the court, dated July 18, 1938, and to the denial of findings of fact numbered 4, 8, 11, 13, 14, 16; 17, 19, 20, 21, 22, 23, 24, 26, 28, 29, 31, 32, 35, 36, 37, 40, 41, 43 and 44 and to the denial of conclusions of law numbered 1, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43 and 44, as requested by the defendants, this 27th day of October, 1938.

JOHN KNIGHT
U. S. D. J.

And the defendants pray that their bill of exceptions may be allowed, settled and signed.

LEONARD G. MCANENY,
Attorney for Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the bill of exceptions herein contains all the material facts, proceedings, rulings and exceptions thereto occurring upon the trial of this cause and not heretofore a part of the record herein and that the exhibits set forth or referred to constitute all the exhibits offered in evidence at the said trial and that the same may be settled and allowed in the form proposed and submitted and ordered on file as a bill of exceptions herein.

Dated, Yonkers, New York, November 17, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Attorney for Defendants.

Order Settling Bill of Exceptions.

It appearing that the foregoing bill of exceptions contains all of the material facts, matters, things, proceedings, rulings, and exceptions thereto, occurring upon the trial of this cause, and not heretofore a part of the record herein, including all evidence adduced at the said trial, and that the exhibits set forth in the foregoing bill of exceptions constitute all of the exhibits offered in evidence in the said trial.

I hereby settle and allow the foregoing bill of exceptions as a full, true, and correct bill of exceptions in this cause and order the same on file, and further order the clerk of this court to transmit said entire bill of exceptions to the Circuit Court of Appeals for the Second Circuit.

Dated this 18th day of November, 1938.

JOHN KNIGHT,
U. S. D. J.

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Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

419

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

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Appearances:

BENJAMIN W. MOORE, Yonkers, N. Y., for Plaintiff.

LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y.; MORRIS L. ROSENWASSER, and HAROLD T. GARRITY, of Counsel for Defendants.

Hon. JOHN KNIGHT, District Judge:

On March 4, 1933, the defendants, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, had on deposit with the First National Bank and Trust Company (hereinafter referred to as the bank) in a checking account nominated: "Police Pension Fund, City

of Yonkers" the sum of $29,283.67, and in a checking account nominated: "City of Yonkers, Police Pension Fund" the sum of $50.00. This money was deposited with the bank in accordance with a resolution adopted by the Board of Estimate and Apportionment of the City of Yonkers on July 10, 1929, designating the First National Bank and Trust Company as one of the depositaries for the "purpose of depositing all moneys of the city received by the City Treasurer of the City of Yonkers." The City of Yonkers then held various bonds deposited by the bank as security for the above mentioned and other deposits. All of the aforesaid deposits were withdrawn by a series of checks beginning March 10, 1933, and ending October 26, 1933, inclusive. Thereafter the bonds pledged to secure said deposits were returned to the bank.

In *Downey* v. *City of Yonkers*, this day decided by me, I have held that the pledge of assets to secure public funds is illegal and *ultra vires*. It is defendants' contention herein that the Police Pension Fund of the City of Yonkers is a public fund. It is not necessary to decide whether it is or is not. The pledge of assets to secure either public or private funds is *ultra vires*. *City of Marion* v. *Sneeden*, 291 U. S. 262; *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245 (rehearing denied 292 U. S. 600).

For the reasons given in *Downey* v. *City of Yonkers*, *supra*, the pledge of the securities for this deposit was *ultra vires*.

The plaintiff is entitled to recover the sum of $14,641.81 being the difference between the amount which the plaintiff should have received as a fifty per cent. dividend from the bank and the amount paid by the bank to the city on account of the two deposits aforesaid, with interest from April, 1936. Findings of Fact and Conclusions of Law may be submitted; to be signed and made a part of this opinion. June 8, 1938.

JOHN KNIGHT,
United States District Judge.

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Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

425

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

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The issues in this action having been regularly brought on for trial before Hon. John Knight, District Judge, on the 4th and 5th days of January, 1938, without a jury, and the plaintiff having appeared by Benjamin W. Moore, his attorney, and Milton L. Romm, of counsel, and the defendants having appeared by Leonard G. McAneny, Esq., Corporation Counsel, and Morris L. Rosenwasser, Esq. and Harold T. Garrity, Esq., Assistant Corporation Counsels, and the court having heard the allegations and proofs of the parties and having filed its opinion, dated June 8, 1938, and its findings of fact and conclusions of law, dated July 18, 1938, directing judgment as hereinafter stated, and the costs of the plaintiff having been duly taxed at $72.85.

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Now, on motion of Benjamin W. Moore, attorney for the plaintiff, it is

ADJUDGED that the plaintiff, Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, do recover of the defendants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, the sum of
428 $14,641.84 together with interest thereon in the sum of $2,255.73 and the sum of $72.85 costs as taxed, making in all the sum of $16,970.42 and that the plaintiff have execution therefor against the defendants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers.

Judgment signed this 5th day of August, 1938.

CHARLES WEISER,
Clerk.

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Opinion of Court on Applicability of Rules of Civil Procedure.

The motion in each of these cases for an order limiting exceptions herein pursuant to new Rule 46 is denied. Irrespective of the question of whether new Rule 86 applies to actions in which final judgment had been entered prior to the effective date of the new rules, it is my view that the application of the new rules would not be feasible and work injustice to the defendant.

An order may be submitted to conform with this communication.

JOHN KNIGHT,
U. S. D. J.

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Order Denying Motion to Apply New Rules on Appeal.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court House thereof in the Borough of Manhattan, City of New York, on the 18th day of October, 1938.

Present:

HON. JOHN KNIGHT,
District Judge.

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WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

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The defendants having moved this Court for an order invoking the application of the Federal Rules of Civil Procedure to this action with respect to Rule 46 eliminating the necessity for exception and Rule 73 eliminating the necessity of assignments of error, and said motion having

Order Denying Motion to Apply New Rules on Appeal. 433

been submitted by Leonard G. McAneny, Esq., attorney for the defendants, and by Benjamin W. Moore, attorney for the plaintiff, by Milton L. Romm, of counsel,

Now, on reading and filing the notice of motion dated the 20th day of September, 1938 and the affidavit of Leonard G. McAneny, thereto annexed, verified the 20th day of September, 1938, in support of said motion, and the affidavit of Benjamin W. Moore, verified the 3rd day of October, 1938, in opposition thereto, it is

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ORDERED, that the motion be and it hereby is in all respects denied.

JOHN KNIGHT,
District Judge.

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Petition and Order Allowing Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER E. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

437

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

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To the Honorable William Bondy, Judge of the District Court, sitting for the Southern District of New York:

Now, come the defendants-appellants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, by Leonard G. McAneny, their attorney, and feeling themselves aggrieved by the judgment of this Court entered on the 5th day of August, 1938, hereby pray that an appeal may be allowed

to them from said judgment, to the United States Circuit Court of Appeals for the Second Circuit, and that citation issue, and, in connection with this petition, petitioners herewith present their assignment of errors.

Petitioners further pray that an order be made fixing the amount of the bond to be given by defendants for costs, and a proper transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, shall be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

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Dated: Yonkers, New York, October 28th, 1938.

LEONARD G. MCANENY,
Corporation Counsel, Attorney for
Defendants-Appellants.

The above appeal is hereby allowed.

Dated: New York, N. Y., October 31st, 1938.

WM. BONDY,
U. S. D. J. 441

A bond for costs in the usual form was duly approved and filed in the office of the Clerk of the Court on October 31, 1938.

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Assignments of Error and Prayer for Reversal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

443

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

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NOW COME the defendants-appellants Joseph F. Loehr, Mayor; James J. Hushion, Comptroller; and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, by Leonard G. McAneny, Corporation Counsel, their attorney, and submit, present and file their assignment of errors complained of and say:

That in the records and proceedings of the Hon. United States District Court for the Southern District of New York in a certain action entitled "Walter F. Downey, Receiver

of The First National Bank and Trust Company of Yonkers, in liquidation, Plaintiff v. Joseph Loehr, Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, Defendants", and in the determination of the issues raised, there is manifest error to the injury and prejudice of the said appellant, and for such error the appellant assigns the following:

1. The said Court erred in finding that the bank did not open for business on March 4, 1933 and never afterwards reopened for regular business. 446

2. The said Court erred in finding that no statute of the State of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

3. The said Court erred in finding that no statute of the State of New York confers upon state banks the specific power to pledge assets to secure deposits of the City of Yonkers.

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4. The said Court erred in finding that no applicable ordinance or local law of the City of Yonkers confers upon any bank the power to secure the deposits of the City of Yonkers.

5. The said Court erred in finding that under the common law of the State of New York as declared by its highest court, state banks lack the power to pledge assets to secure deposits of political subdivisions of the state.

6. The said Court erred in finding that the pledge of assets by the bank to secure the deposits in the accounts

448. *Assignments of Error and Prayer for Reversal.*

of the "Police Pension Fund, City of Yonkers", and "City of Yonkers, Police Pension Fund", was illegal and *ultra vires.*

7. The said Court erred in finding that the bank was insolvent as of the 6th day of March, 1933 and that the rights of the general creditors of the bank became fixed as of March 6, 1933.

8. The said Court erred in finding that the payments to the defendants from the deposit accounts, "Police Pen-
449 sion Fund, City of Yonkers", and "City of Yonkers, Police Pension Fund", were made with a view to the preference of the defendants over other creditors of the bank.

9. The said Court erred in finding that no service of any notice of claim or of intention to sue by the bank through its receiver was required.

10. The said Court erred in finding that the payments from the Police Pension Fund, City of Yonkers, deposit account, and City of Yonkers, Police Pension Fund, deposit account, to the defendants, were voluntarily made under a
450 mistake of law but are nevertheless recoverable.

11. The said Court erred in finding that plaintiff is entitled to recover the sum of $14,641.84, being the difference between the amount which the defendants should have received under the 50% dividend paid by the bank and the sum of $29,283.67 paid to the defendants, together with interest and the costs of this action.

12. The said Court erred in finding that the plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $17,570.20 from May 1, 1936 to November 2, 1937, and interest at the same rate on the sum of $14,641.84

from November 3, 1937 to the date of the judgment to be entered herein.

13. The said Court erred in failing to find that Local Law number 1—1931 of the City of Yonkers, contained all the provisions set forth in paragraph numbered "4" in Defendants' Requests for Findings of Fact and Conclusions of Law.

14. The said Court erred in failing to find that the moneys on deposit in The First National Bank and Trust Company of Yonkers in the accounts "Police Pension Fund, City of Yonkers" in the sum of $29,233.67, and "City of Yonkers, Police Pension Fund" in the sum of $50, were public funds. 452

15. The said Court erred in failing to find that The First National Bank and Trust Company was solvent on March 4, 1933.

16. The said Court erred in failing to find that the President's Proclamation of March 6, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent. 453

17. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

18. The said Court erred in failing to find that the President's Proclamation of March 9, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

19. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 9, 1933.

454 *Assignments of Error and Prayer for Reversal.*

20. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

21. The said Court erred in failing to find that from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers was under the management and control of its own officers.

22. The said Court erred in failing to find that from March 6, 1933, to March 20, 1933, The First National Bank
455 and Trust Company was permitted to transact such business as any other bank was permitted to transact under the Presidential Proclamations of March 6, and 9, 1933.

23. The said Court erred in failing to find that from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers had the right to make payments on account of pension checks drawn against funds deposited prior to March 4, 1933.

24. The said Court erred in failing to find that on March 28, 1933, Percival W. Trudeau, in consideration (1)
456 of the defendants' releasing their lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City, (2) of the defendants not foreclosing their said lien in the State Courts, (3) of the City's surrendering the said assets so deposited, agreed with the defendants that he would pay out the funds of the defendants remaining on deposit with The First National Bank and Trust Company provided the City would return the bonds deposited with the City as security as the funds were paid out.

25. The said Court erred in failing to find that on March 28, 1933, pursuant to the said agreement between

Percival W. Trudeau and the defendants, the City of Yonkers in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for the defendants' deposits, of the par value of $197,000.

26. The said Court erred in failing to find that the moneys paid out of the account "Police Pension Fund, City of Yonkers" by The First National Bank and Trust 458
Company of Yonkers were payments made in the regular course of business of such bank.

27. The said Court erred in failing to find that the moneys paid out of the account "City of Yonkers, Police Pension Fund" by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

28. The said Court erred in failing to find that between March 29, 1933, and January 23, 1934, pursuant to the said agreement between Pervical W. Trudeau and the defendants, the City of Yonkers, in consideration of said agree- 459
ment and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for defendants' deposits, of the par value of $337,000 on the dates and in the amounts as follows:

April 3, 1933	$193,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

leaving $1,000 of said bonds in the hands of the City of Yonkers.

29. The said Court erred in failing to find that the defendants were secured depositors to the extent of deposits in the account "Police Pension Fund, City of Yonkers" in the sum of $29,233.67.

30. The said Court erred in failing to find that the defendants were secured depositors to the extent of deposits in the account "City of Yonkers, Police Pension
461 Fund" in the sum of $50.

31. The said Court erred in failing to find that the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company deposited with the City of Yonkers as security for their deposits.

32. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

462 33. The said Court erred in failing to find that all of the moneys paid by The First National Bank and Trust Company of Yonkers to the defendants out of the accounts "Police Pension Fund, City of Yonkers" and "City of Yonkers, Police Pension Fund" were paid while said bank was solvent.

34. The said Court erred in failing to find that the Treasurer of the City of Yonkers is and was a person receiving and depositing moneys belonging to the State of New York.

35. The said Court erred in failing to find that all acts found to have been done herein by the City of Yonkers were done by it on behalf of and as agent for the defendants.

36. The said Court erred in failing to make the conclusion of law that the defendants are entitled to judgment dismissing the complaint with costs.

37. The said Court erred in failing to make the conclusion of law that the funds deposited by the defendants in The First National Bank and Trust Company of Yonkers in accounts, "Police Pension Fund, City of Yonkers", 464
in the sum of $29,233.67, and "City of Yonkers, Police Pension Fund", in the sum of $50.00 were public funds.

38. The said Court erred in failing to make the conclusion of law that the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

39. The said Court erred in failing to make the conclusion of law that the appointment of Louis D. Rossire, as successor Conservator of The First National Bank and 465
Trust Company of Yonkers did not create a presumption that said bank was insolvent.

40. The said Court erred in failing to make the conclusion of law that solvency is presumed until the contrary is proved.

41. The said Court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

466 *Assignments of Error and Prayer for Reversal.*

42. The said Court erred in failing to make the conclusion of law that the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to March 20, 1933.

43. The said Court erred in failing to make the conclusion of law that the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

467

44. The said Court erred in failing to make the conclusion of law that the plaintiff is not entitled to recover deposits of the defendants paid out by The First National Bank and Trust Company of Yonkers prior to its insolvency.

45. The said Court erred in failing to make the conclusion of law that the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

46. The said Court erred in failing to make the conclu-
468 sion of law that the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to March 20, 1933.

47. The said Court erred in failing to make the conclusion of law that the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to January 23, 1934.

48. The said Court erred in failing to make the conclusion of law that the negotiation of a settlement of claims

against The First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same was within the scope of the authority of Percival W. Trudeau, as Conservator of said bank.

49. The said Court erred in failing to make the conclusion of law that the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants, was based upon a good and valid consideration. 470

50. The said Court erred in failing to make the conclusion of law that the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants, constituted an accord and satisfaction.

51. The said Court erred in failing to make the conclusion of law that the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency. 471

52. The said Court erred in failing to make the conclusion of law that National Banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

53. The said Court erred in failing to make the conclusion of law that the validity, force and effect of the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants, is determined by the laws of New York, the place of making.

472 *Assignments of Error and Prayer for Reversal.*

54. The said Court erred in failing to make the conclusion of law that under the law of the State of New York state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions thereof, in such banks.

55. The said Court erred in failing to make the conclusion of law that The First National Bank and Trust Company was authorized by law to give security for the safe-
473 keeping and prompt payment of public funds deposited with it by the defendants.

56. The said Court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers deposit of assets with the City of Yonkers as security for the defendants' deposits of public funds was lawful.

57. The said Court erred in failing to make the conclusion of law that the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among other deposits, deposits by the defendants in the accounts,
474 "Police Pension Fund, City of Yonkers", in the sum of $29,233.67, and "City of Yonkers, Police Pension Fund" in the sum of $50.00 was lawful.

58. The said Court erred in failing to make the conclusion of law that the defendants were secured depositors of The First National Bank and Trust Company of Yonkers.

59. The said Court erred in failing to make the conclusion of law that if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with the City of Yonkers should serve as security for all

of said City's deposits was beyond the powers of the said Bank, the rights and obligations of the plaintiff and defendant arising therefrom are determined by the laws of the State of New York.

60. The said Court erred in failing to make the conclusion of law that in order to repossess itself of the assets, given to secure the deposits of the defendants, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to defendants.

61. The said Court erred in failing to make the conclusion of law that the payments of deposits between March 4, 1933, and March 20, 1933, to the defendants by The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

62. The said Court erred in failing to make the conclusion of law that the payment of deposits between March 20, 1933, and March 28, 1933, to the defendants by the Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

63. The said Court erred in failing to make the conclusion of law that the payment of deposits between March 28, 1933, and January 23, 1934, to the defendants by the Conservator and successor Conservator of The First National Bank and Trust Company of Yonkers were "per-

478 *Assignments of Error and Prayer for Reversal.*

mitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

64. The said Court erred in failing to make the conclusion of law that the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as security for the indebtedness.

479 65. The said Court erred in failing to make the conclusion of law that the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City of Yonkers as security for the deposits of the defendants.

66. The said Court erred in failing to make the conclusion of law that this action was not commenced within the time limited by law.

67. The said Court erred in failing to make the conclusion of law that the City of Yonkers is prohibited by law from paying the claim alleged in the complaint.

480 68. The said Court erred in failing to make the conclusion of law that the City of Yonkers is prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the claimant, and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller, and shall have been audited and allowed by him.

69. The said Court erred in failing to make the conclusion of law that the City of Yonkers is not liable in a civil action for damages or injuries to person or property,

or invasion of personal or property rights, of any name or nature whatsoever, arising at law or in equity, alleged to have been caused or sustained by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the City, or any of its agents, officers or employees, unless a claim therefor in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or an account of which the claim arose, be presented to the common council and served upon the 482
Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall be commenced thereon within one year after the happening of such accident or injury or the occurrence of such act, omission, fault or neglect.

70. The said Court erred in denying the defendants' motion to dismiss the complaint made at the end of the plaintiff's case.

71. The said Court erred in sustaining the objection by the plaintiff to the following: 483

> "Q. And as City Treasurer, what were your duties? A. The duties were to see, of course, that the tax collections and the money received by the City from various departments were properly placed in the bank and checks had to be countersigned by the Treasurer and then the Comptroller's general supervision of the office of the City Treasurer; and also to see when money was deposited in the bank that the bank properly secured, or we got security from the banks in which these deposits were placed.

484 *Assignments of Error and Prayer for Reversal.*

Mr. Moore: I object to that and move that the last part of the answer be stricken out.

The Court: What was the question?

(Record read by the stenographer.)

The Court: It may go out. I suppose his duties were fixed by statute.

Mr. McAneny: I take an exception.

The Court: Stricken out, and exception to the defendants."

485 72. The said Court erred in denying the defendants' motion to dismiss the complaint made at the conclusion of the whole case.

WHEREFORE, said defendants-appellants respectfully pray:

1. That the judgment entered in said action be reversed.

2. That judgment be entered in favor of the defendants with costs in all courts.

3. That the Lower Court be directed to enter judgment in favor of the defendants with costs in all courts.

486

4. That said defendants-appellants have such other, further or different relief as may be just.

Dated: October 28th, 1938.

LEONARD G. MCANENY,
Corporation Counsel Attorney for
Defendants-Appellants.

487

Citation.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

488

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

489

To Walter F. Downey, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, Appellee, and Benjamin W. Moore, his attorney:

Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit held at Federal Courthouse, in the Borough of Manhattan, City and State of New York, within thirty days from the date hereof, pursuant to an appeal filed in the office of the United States District Court, South-

490 *Citation.*

ern District of New York, at New York, N. Y., wherein Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Denis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers are appellants and Walter F. Downey, as Receiver of the First National Bank and Trust Company of Yonkers, in liquidation is appellee, to show cause, if any there be, why the judgment entered herein on the 5th day of August, 1938, should not be corrected and why speedy justice should not
491 be done to the parties in that behalf.

WITNESS, the Honorable William Bondy, Judge of the District Court of the United States, sitting for the Southern District of New York, on this 31st day of October, 1938.

WILLIAM BONDY,
U. S. D. J.

492

493

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

494

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

495

To Charles Weiser, Clerk of the United States District Court, Southern District of New York.

Sir:

Notice is hereby given that Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Denis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, defendants above named, hereby appeal to the Circuit Court of Appeals for the Sec-

496 *Stipulation and Order Extending Time to File Record.*

ond Circuit from the final judgment entered in this action on August 5, 1938.

Dated: New York, N. Y.
October [illegible], 1938.

LEONARD G. MCANENY,
Corporation Counsel, Attorney
for Defendants,
Office & P. O. Address,
City Hall,
Yonkers, New York.

497

Stipulation and Order Extending Time to File Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

498 Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

WHEREAS, an appeal was allowed the defendants herein on the 31st day of October, 1938, and

Stipulation and Order Extending Time to File Record. 499

WHEREAS, the time of the said defendnats to docket this case and file the transcript of record on appeal herein with the Clerk of the United States Circuit Court of Appeals for the Second Circuit will expire on November 30, 1938, now therefore,

IT IS STIPULATED AND AGREED, by and between the parties hereto that the time of the defendants to docket this case and file the transcript of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938 and an order to this effect may be entered by either 500
party without notice.

Dated: Yonkers, New York, November 23, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendants.

On reading and filing the foregoing stipulation, it is 501

ORDERED, that the time of the defendants to docket the above entitled case and file the transcrpit of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938.

Dated: New York, N. Y., November 23, 1938.

CHARLES WEISER,
Clerk, U. S. District Court,
Southern District of New York.

502 **Stipulation and Order Settling Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

503 *against*

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

IT IS HEREBY STIPULATED AND AGREED, that the foregoing
504 is a true copy of the transcript of the record of the District Court in the above entitled matter as agreed upon by the parties.

Dated: Yonkers, New York, November 29, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendants.

Stipulation and Order Settling Record. 505

On reading the foregoing stipulation, it is

ORDERED, that the foregoing printed record be filed in lieu of the original appeal papers for the purpose of certifying a record on appeal.

Dated: New York, N. Y., December 3rd, 1938.

VINCENT L. LEIBELL
U. S. D. J.

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508

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

509

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

510

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the printed transcript of the record of the said District Court in the above entitled matter.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York this 5th day of December, in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundredth and sixty-third year.

CHARLES WEISER,
Clerk.

(SEAL)

511

Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
THE CITY OF YONKERS,
Defendant-Appellant.
No. 230.

512

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,
Defendants-Appellants.
No. 231.

513

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants-Appellants.
No. 232.

514 *Opinion.*

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders of "The Saunders Trade School Fund",
Defendant-Appellant.

No. 233.

515 Before:

L. HAND, AUGUSTUS N. HAND and CHASE,
Circuit Judges.

Appeals from the United States District Court for the Southern District of New York.

From judgments in the several actions above-named that the Receiver of the First National Bank & Trust Company of Yonkers in Liquidation recover of the respective defendants therein fifty per cent. of certain moneys paid
516 out by the Bank between March 8, 1933 and January 23, 1934, inclusive, on checks drawn on behalf of the various defendants, the latter appeal. Affirmed.

LEONARD G. MCANENY, Corporation Counsel, for Defendants-Appellants; LEONARD G. MCANENY, E. J. DIMOCK, MORRIS L. ROSENWASSER, J. DONALD RAWLINGS and HAROLD T. GARRITY, Counsel.

BENJAMIN W. MOORE, Attorney for Plaintiff-Appellee; BENJAMIN W. MOORE and MILTON L. ROMM, Counsel.

Opinion. 517

AUGUSTUS N. HAND, Circuit Judge:

The legal principles applicable to Action No. 230 against the City of Yonkers are determinative of the issues in the other three cases which need not, therefore, be separately discussed.

This is an action by the receiver of The First National Bank & Trust Company of Yonkers (herein called the Bank) against The City of Yonkers (herein called the City) to recover fifty per cent. of certain money paid out by the Bank, between March 8, 1933, and January 23, 518
1934, inclusive, on the checks of the City. Since September 30, 1929, the Bank has been a national banking corporation organized and existing under the laws of the United States and the City a municipal corporation organized and existing by virtue of the laws of the State of New York.

On March 4, 1933 the City had funds on deposit in checking accounts in the Bank as follows:

(1) Treasurer of the City	$275,105.53
(2) City of Yonkers	1,502.84
(3) Nepperhan Sewer Fund of City of Yonkers	621.88

519

On March 4, 1933, the Governor of the State of New York proclaimed a bank holiday, and on March 6, 1933, the President of the United States proclaimed a bank holiday which was extended by further proclamation on March 9, 1933 and ratified by Congress on the latter date. The Bank never reopened for regular business after March 4, 1933 but operated under restrictions imposed by the Secretary of the Treasury until a Conservator was appointed. On March 20, 1933 the Comptroller of the Currency appointed a Conservator of the Bank and on Janu-

520 ary 23, 1934, appointed a receiver in liquidation. A dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 3, 1937.

On March 4, 1933, the City held various bonds having a par value of $535,000 which had been delivered to it by the Bank as security for the above three accounts, among others. These bonds, to the amount at par of $534,000, were later returned in connection with withdrawals from the accounts.

521 By a series of withdrawals beginning on March 8, 1933 and ending on January 23, 1934, the City withdrew almost all of the balance in each of the three accounts as follows:

1. Account with Treasurer of City		$275,105.53
Withdrawals:		
March 8 to March 19	$ 89,226.06	
March 20 to March 27	67,735.99	
March 28 on	118,016.99	
Total		274,979.04

522

2. Account with City of Yonkers		$ 1,502.84
Withdrawals:		
May 23 to July 21, 1933		1,502.84

3. Account with Sewer Fund		$ 621.88
Withdrawals:		
May 4, 1933		621.88

523

The complainant seeks to recover fifty per cent. of the above withdrawals on the ground that they constituted an unlawful preference within Sections 91 and 194, U. S. C. A., of the National Bank Act.

If the pledge of bonds to secure the deposits was authorized by the National Bank Act it is clear that the City had a valid lien on the bonds to the extent of its deposits and this action by the receiver must fail. *Lewis* v. *Fidelity Deposit*, 292 U. S. 559; *McNair* v. *Knott*, 302 U. S. 369. It is likewise settled that national banks have no implied power to pledge assets to secure either private or public deposits, *Texas & Pac.* v. *Pottorff*, 291 U. S. 245; *Marion* v. *Sneeden*, 291 U. S. 262. Express authority for the pledge made in this case depends upon whether the requirements of the Act of June 25, 1930, 12 U. S. C. A., §90, have been met. That section provides that:

524

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

525

The purpose of the Act of June 25, 1930 was to equalize the positions of national and state banks in competing for deposits, and is in line with a long series of acts, beginning in 1864, designed to apply the policy of equalization. *Lewis* v. *Fidelity Co.*, 292 U. S. 559, at 564-65.

It is conceded that there was no express statutory authority in New York authorizing state banks to give security for these deposits during the times involved. In the absence of express enabling statutes state banks in New York are not authorized to pledge assets to secure either private or public deposits, and it is the duty of the

Superintendent of Banks to compel them to recover any assets so pledged upon the return of the deposits when demanded. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, at 187-88. As was said by Judge Finch in his opinion in *City of Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, 406: "No question remains that this pledge by the defendant securing the deposit (of public money) was *ultra vires* as to both parties." So far as the Act of June 25, 1930 may be thought to require an authorization of state banks to make pledges as a prerequisite for pledges by
527 national banks it does not apply here.

But the law of New York is that pledges by state banks to secure deposits, even though *ultra vires*, may not be set aside until the deposits have been repaid in full, whether or not insolvency has intervened. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175; *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400. The parties concede that the law of New York with respect to the effect of an *ultra vires* pledge does not bring the pledges here within the Act of June 25, 1930. The policy of the statute would appear to lead to the same conclusion. The Act was designed to equalize competition for public deposits and it does not appear to
528 give national banks authority to do what the state banks are forbidden to do and what the State Superintendent of Banks is under a duty to undo. The banks of the State could not give security in a case like this without violating their charters; Congress could not have intended to meet that type of competition. The use of the term "authorized" in the Act accords with this view; a pledge which is "*ultra vires*" cannot be said to be "authorized".

The City argues, however, that the pledge made by the national bank in this case, even though not authorized and outside the scope of its charter powers, should be given the same effect as State law gives to similar pledges by State banks. Such a result would be contrary to the result reached in *Texas & Pac. Ry.* v. *Pottorff*, 291 U. S. 245, and

Marion v. *Sneeden*, 291 U. S. 262, in which the Court held that a national bank might recover assets which had been pledged to secure deposits even though the depositor would not be paid in full because of supervening insolvency of the bank.

The City says that these decisions are not controlling because in neither did it appear that the law of the State where the transaction occurred gave any different effect to an *ultra vires* pledge by a bank than that given under the federal law. Nevertheless both decisions make it plain, that, unless the right to pledge is expressly granted by a 530
federal statute, a pledge to secure deposits in national banks is wholly unauthorized and, as Justice Brandeis said in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 255: "To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets. • • • This policy of equal treatment was held to preclude, in case of a national bank, even the preference under §3466 of the Revised Statutes which otherwise is accorded to the United States when its debtor becomes insolvent. *Cook County National Bank* v. *United States*, 107 U. S. 445. The effect of a pledge is to withdraw for the benefit of one depositor 531
part of the fund to which all look for protection."

It is true that in spite of the foregoing general policy of the Act, Congress has seen fit to permit national banks to give security to depositors "of the same kind as is authorized by the law of the State", but it seems unreasonable to suppose that the general policy of the National Bank Act to prevent preferences is to be so limited as to permit hypothecations of assets that do not strictly fall within the statutory exceptions to a sound general rule requiring equal distribution of the assets of insolvent banks among all depositors. As we have already said the words

"authorized by the law of the State" plainly relate to the authority of state banks under their charters and not to the effect to be given to their *ultra vires* acts. Under the law of New York, as it existed at the time the Bank became insolvent, there can be no doubt that the pledges were unauthorized. In *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, and *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, the Court of Appeals held that enforcement of the law prohibiting pledges to secure deposits lay with the State Superintendent of Banks who, under his statutory powers, should be alert to prevent such pledges
533 and to undo them prior to the occurrence of insolvency. The Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, evidently felt that the supervisory power of the Comptroller of the Currency was not enough to insure adequate enforcement of the policy to prevent pledges but that they should be treated by the courts as wholly void. The question of the right of a national bank to pledge its assets to secure depositors and the effect to be given to such a pledge when once made are both clearly matters of national concern. The rule in some of the states (including New York) that a bank is estopped to rescind a pledge to a depositor until he is paid in full is directly in the face of
534 the policy attributed to the National Bank Act in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262. In this connection see *Merchants' National Bank* v. *Wehrmann*, 202 U. S. 295; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 372; *California Bank* v. *Kennedy*, 167 U. S. 362.

The rationale of the two cases cited from the New York Court of Appeals appears to be that a banking corporation organized under the laws of the State has certain actual powers outside the powers authorized by its charter and that its exercise of such *ultra vires* powers may create an estoppel not only against the corporation itself but also

against its general creditors. The measure of the powers of a national bank, on the other hand, is the statutory grant and powers not conferred by Congress are denied. The Act under which national banks are organized constitutes a complete system for their government. *Cook County Nat. Bank* v. *United States*, 107 U. S. 445, 448; *California Bank* v. *Kennedy*, 167 U. S. 362. The decision of the Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 260-61, is based upon a holding that a national bank cannot exercise powers not granted so as to erect an estoppel against the general creditors for whose benefit the limitation of powers was imposed. See *Concord First National Bank* v. *Hawkins*, 174 U. S. 364. If the problem here be viewed as depending upon the powers which a national bank can exercise it seems clear that the extent of its powers must be determined by an interpretation of the federal statute in the light of the policy therein expressed and that views of state courts on the powers of local corporations have no relevance except as Congress expressly makes them applicable. For the foregoing reasons the plaintiff receiver who represents the general creditors is not estopped to set aside the pledge that was made in this case.

The holding in *Willing* v. *Binenstock*, 302 U. S. 272, and *Scott* v. *Armstrong*, 146 U. S. 499, 510, that a setoff, allowed under the common law of a State to an insolvent bank is not objectionable as a preference, does not militate against avoiding the pledges here. The transactions in those cases were ones which the banks were authorized to make and the state law was followed because it did not conflict with the policy of the Bank Act. It is one thing to sanction a general rule of law which allows a depositor to set off his deposit against his indebtedness, it is another thing to sanction a preference based on a transaction forbidden by the Act.

538 *Opinion.*

While a national bank in some cases may be under a duty to return benefits it has received as the result of an *ultra vires* transaction (see *First National Bank* v. *Mott Iron Works*, 258 U. S. 240; *Citizens National Bank* v. *Appleton*, 216 U. S. 196), the rule if applicable here would not help the defendant since it would not be entitled to a preference against the other depositors of the insolvent bank in the absence of tracing a specific *res*. *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 261; *cf. Rankin* v. *Emigh*, 218 U. S. 27. It is well settled that the distribution
539 of the assets of an insolvent national bank is governed by federal law and that state laws which attempt to create preferences which arise at the time of insolvency are to be disregarded. *Old Company's Lehigh, Inc.* v. *Meeker*, 294 U. S. 227; *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216; *Davis* v. *Elmire Savings Bank*, 161 U. S. 275.

The City claims that the payments to it prior to the Conservatorship were not made "after the commission of an act of insolvency, or in contemplation thereof * * * with a view to the preference of one creditor to another * * *". The Bank was closed from March 4, 1933
540 to March 6, 1933 under proclamations by the Governor of New York and the President of the United States. Later it was permitted to operate under restrictions imposed by the Secretary of the Treasury. On March 20 a Conservator was appointed with the powers of a receiver as provided in 12 U. S. C. A., §203. On January 23, 1934, the Comptroller of the Currency on a finding of insolvency appointed a receiver. The Bank never opened for regular business after March 4, 1933. No attempt was made by the appellants to show any change in the Bank's condition after March 4, 1933. We hold that the facts indicated that the Bank would not be able to pay its depositors in due course and the trial court could properly draw the inference that the pay-

ments were in violation of 12 U. S. C. A., §91. See *Dehne* v. *Mine Safety Appliance Co.*, 94 F. (2d) 956 (C. C. A. 3); *cf. Kullman* v. *Wooley*, 83 F. (2d) 129 (C. C. A. 5); *Willing* v. *Eveloff*, 94 F. (2d) 344 (C. C. A. 3); *Hardee* v. *Washington Loan & Trust Co.*, 91 F. (2d) 314 (App. D. C.).

The payments made by the Conservator were recoverable on still another theory because made out of the assets of an insolvent under a mistake of law. *LaParr* v. *City of Rockford, Ill.*, 100 F. (2d) 564 (C. C. A. 7); *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 152 (App. D. C.), aff'd. 297 U. S. 383. For the foregoing reasons the judgments in the four cases on appeal are affirmed.

544

Order for Mandate.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of August, one thousand nine hundred and thirty-nine.

Present:

545 Hon. LEARNED HAND,
Hon. AUGUSTUS N. HAND,
Hon. HARRIE B. CHASE,
Circuit Judges.

WALTER F. DOWNEY, Receiver, etc.,
Plaintiff-Appellee,

vs.

JOSEPH F. LOEHR, Mayor, etc., *et al.*,
Defendants-Appellants.

No. 231.

546

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

IT IS FURTHER ORDERED that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver, etc.,

vs.

JOSEPH F. LOEHR, Mayor, *et al.*,

ORDER FOR MANDATE.

United States Circuit of Appeals,
Second Circuit,
Filed Aug. 22, 1939,
D. E. ROBERTS, Clerk.

550

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 183, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

551

WALTER F. DOWNEY, Receiver, etc.,

Plaintiff-Appellee,

against

JOSEPH F. LOEHR, Mayor, *et al.*,

Defendants-Appellants.

as the same remain of record and on file in my office.

552

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighteenth day of September, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-fourth.

[SEAL]

D. E. ROBERTS,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5714)

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 544

JOHN J. CONDON, MAYOR, GUSTAV W. KLEIN, JR., FIRST DEPUTY AND ACTING COMPTROLLER, AND RAYMOND J. WHITNEY, CITY MANAGER, ETC., PETITIONERS,

vs.

WALTER F. DOWNEY, RECEIVER OF THE FIRST NATIONAL BANK AND TRUST COMPANY OF YONKERS, IN LIQUIDATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1939.

CERTIORARI GRANTED DECEMBER 18, 1939.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

Statement Under Rule 13.

This is an appeal by the defendants above named from a judgment made and entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 5th day of August, 1938 in the above entitled case in favor of the plaintiff, Walter F. Downey, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, against the defendants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, in the sum of $8,295.38, together with interest thereon in the sum of $1,277.98 and costs in the sum of $77.85.

Statement Under Rule 13.

This action was commenced on February 7, 1936 by the original plaintiff herein, Arthur E. Muth, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, by the filing of a praecipe and the issuance of a summons. The summons and complaint with proof of service were filed on February 13, 1936. The defendants filed an answer on March 24, 1936, which was amended by stipulation dated November 24, 1937. Walter F. Downey, having been appointed Receiver of the First National Bank and Trust Company in the place of Arthur E. Muth on November 15, 1937, he was by an order dated November 26, 1937, substituted as plaintiff in the place and stead of said Arthur E. Muth.

On January 4, 1938 this case was tried before Judge John Knight without a jury, a jury having been waived by stipulation on the record. Judge Knight reserved decision.

On June 8, 1938, Judge Knight rendered his decision in favor of the plaintiff.

On July 18, 1938, findings of fact and conclusions of law, as requested by the plaintiff, were signed by Judge Knight and on the same day Judge Knight signed a memorandum containing his rulings upon the defendants' requests for findings of fact and conclusions of law. The findings and memorandum were filed on or about July 29, 1938.

On August 3, 1938, costs were taxed in the sum of $77.85 and on August 5, 1938, judgment was entered by the plaintiff against the defendants in the sum of $8,295.38, together with interest thereon in the sum of $1,277.98.

Thereafter defendants made a motion to determine the applicability of the new Rules of Civil Procedure for guidance on the appeal herein. Judge Knight determined under Rule 86 that the application of the new rules would not be feasible and would work injustice in this case. Accordingly, the former procedure has been followed herein except that

in addition appeal was taken under new procedure out of abundant caution.

On October 31, 1938, an appeal was allowed the defendants from the said judgment of August 5, 1938.

There was no arrest, attachment or reference herein.

Plaintiff has appeared throughout the proceedings in the above entitled action by Benjamin W. Moore, Esq. and the defendants have appeared by Leonard G. McAneny, Esq., Corporation Counsel of the City of Yonkers.

Docket Entries.

Date	Matter
Nov. 7, 1936	Filed praecipe and issued summons.
Feb. 13, 1936	Filed summons and complaint and affidavit of service.
Mar. 24, 1936	Filed stipulation extending time to answer to 3/28/36.
Mar. 24, 1936	Filed answer of defendants.
Nov. 20, 1937	Filed note of issue, motion to substitute party plaintiff, returnable 11/26/37.
Nov. 26, 1937	Filed affidavit and notice of motion to substitute Receiver as plaintiff—no opposition.
Nov. 26, 1937	Motion granted—Mandelbaum, J.
Nov. 26, 1937	Filed order substituting Receiver as party plaintiff—Mandelbaum, J.
Jan. 4, 1938	Before Knight—trial begun, jury waived by stipulation—motion to dismiss, etc. —decision reserved.
June 13, 1938	Filed opinion #11,466. Plaintiff to recover $8,295.38—Knight, J.

Docket Entries.

	Date	Matter
July	29, 1938	Filed findings of fact and conclusions of law—Knight, J.
July	29, 1938	Filed defendants' requests for findings of fact and conclusions of law.
July	29, 1938	Filed opinion #11,597 on defendants' requests for findings of fact and conclusions of law—Knight, J.
Aug.	3, 1938	Filed bill of costs taxed at $77.85.
Aug.	5, 1938	Filed stipulation that defendants' answer be deemed amended, etc.
Aug.	5, 1938	Filed judgment #38,410 for plaintiff for $9,651.21.
Sept.	26, 1938	Filed note of issue, motion to determine civil rules 46 and 37, returnable 10/4/38.
Oct.	22, 1938	Filed affidavit and Notice of Motion to determine civil rules 46 and 73.
Oct.	22, 1938	Filed affidavit in opposition to motion to determine civil rules 46 and 73.
Oct.	22, 1938	Filed order denying motion to determine civil rules 46 and 73—Knight, J.
Oct.	28, 1938	Filed order extending time to file bill of exceptions to 1/7/39—Conger, J.
Oct.	29, 1938	Filed exceptions—Knight, J.
Oct.	31, 1938	Filed petition and order allowing appeal —Bondy, J.
Oct.	31, 1938	Filed Assignment of Errors.
Oct.	31, 1938	Filed cost bond on appeal—Great American Indemnity Co.
Nov.	1, 1938	Filed notice of appeal and mailed copy to Benjamin W. Moore, 11/2/38.
Nov.	3, 1938	Filed citation.
Nov.	22, 1938	Filed Bill of Exceptions and settlement of same (Knight).

Summons.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

L. 63-188.

To the Above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Honorable JOHN C. KNOX, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 7th day of February, A. D. 1936.

CHARLES WEISER,
Clerk.

(SEAL)

BENJAMIN W. MOORE,
Plaintiff's Attorney,
Office and Post Office Address:
30 So. Broadway, Yonkers,
State of New York.

16

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff,

against

17

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

Plaintiff complaining of the defendants, by his attorney,
18 Benjamin W. Moore, alleges:

First.—That at all times since the 30th day of September, 1929, the First National Bank and Trust Company of Yonkers has been a national banking corporation organized and existing under the laws of the United States with its principal place of business in the City of Yonkers, County of Westchester and State of New York.

Second.—That the defendants Joseph F. Loehr, James J. Hushion and Dennis M. Morrissey are, respectively, the Mayor, Comptroller and Commissioner of Public Safety of the City of Yonkers, New York, and have since the 1st day

of January, 1932 together constituted the Board of Trustees of the Firemen's Pension Fund of said City of Yonkers having the care, control and management of said fund by virtue of the provisions of Local Law No. 2 of said City of Yonkers duly enacted during the year 1931.

Third.—That on the 20th day of March, 1933 the Comptroller of the Currency of the United States acting under and pursuant to the Bank Conservation Act enacted by the Congress of the United States on March 9, 1933 duly appointed Percival W. Trudeau as Conservator of said First National Bank and Trust Company of Yonkers, and said Conservator, under the direction of said Comptroller, on said March 20, 1933, duly took possession of the books, records and assets of every description of said First National Bank and Trust Company of Yonkers and continued to act as such Conservator until July 24, 1933: that Louis D. Rossire was on said July 24, 1933, by like authority, duly appointed by said Comptroller of the Currency as successor Conservator of said First National Bank and Trust Company of Yonkers in the place and stead of said Percival W. Trudeau; and that said Louis D. Rossire duly qualified as such Conservator and continued to act as such until the 23rd day of January, 1934: that the said Comptroller of the Currency had become satisfied of the insolvency of said First National Bank and Trust Company of Yonkers and that the plaintiff was on that day duly appointed by said Comptroller of the Currency as Receiver of the said First National Bank and Trust Company of Yonkers to liquidate said bank, and that the plaintiff has duly qualified and is now acting as such Receiver.

Fourth.—Upon information and belief that from the said 30th day of September, 1929 the defendants and their predecessors in office have, by virtue of authority vested in them,

maintained a deposit account in said bank under the caption "Firemen's Pension Fund" and on the said 20th day of March, 1933 the credit balance of said deposit account, together with accrued interest computed to the said 20th day of March, 1933, amounted to the sum of Sixteen Thousand Five Hundred Forty and 75/100 ($16,540.75) Dollars.

Fifth: That a pension fund for the firemen of said City of Yonkers was created and established pursuant to the provisions of Chapter 446 of the Laws of the State of New
23 York for the year 1907.

Sixth: That from the time of the creation and establishment of said pension fund to and including the 22nd day of November, 1931 the provisions of the law with regard to the sources of said fund were in substance as follows:

1. All fines imposed on the members of the paid fire department in the city of Yonkers by the commissioner of public safety, when said commissioner of public safety shall be appointed.

2. All rewards, money, gifts, testimonials and emoluments that may be paid or given for or on account of
24 extraordinary services of the said paid fire department or any member thereof, except such as have been or shall be allowed by the commissioner of public safety to be retained by the said member or members.

3. All moneys, pay, compensation or salary, or any part thereof, deducted or withheld from any member or members of said paid fire department for or on account of absence or suspension from duty, except in cases of sickness.

4. All moneys which shall be deducted from the monthly pay of each fireman and officer of said department and from the pay of such other employee of said department, as may

be entitled to participate in said fund, and which shall be the sum of two per centum of the monthly pay, salary or compensation each month from each of the said persons.

5. The sum of $5,000 to be levied and raised by the common council each year in the manner prescribed by law.

Seventh: That from the said 23rd day of November, 1931 to and including the 20th day of March, 1933 the provisions of the law with regard to the sources of said fund were in substance, as follows:

1. All fines imposed by the commissioner of public safety on the members of the fire department in the city of Yonkers.

2. All rewards, money, gifts, testimonials and emoluments that may be paid or given to any member of the fire department for account of fire service except such payments or gifts as have been or shall be allowed by the commissioner of public safety to be retained by the members receiving the same.

3. All money, pay, compensation or salary or any part thereof deducted or withheld from any member or members of the fire department, for or on account of absence or suspension from duty except in cases of sickness.

4. All moneys which shall be deducted from the monthly pay, salary or compensation of each member of said department and which shall be the sum of two per centum of the monthly pay, salary or compensation of each of the said members.

5. An amount payable to the trustees of the firemen's pension fund out of the city treasury at the end of each fiscal year equivalent to one and one-half times the amount of moneys deducted from the monthly pay, salary or com-

pensation of each member of said fire department during said year.

Eighth: That at all the times herein mentioned the purpose and nature of said fund, as provided by law, was to provide for the payment of pensions to duly retired members of the fire department of the City of Yonkers, their widows, children, or next of kin, and in addition thereto, since said 23rd day of November, 1931, to provide for the payment of premiums on group life insurance policies
29 covering the lives of members of said fire department.

Ninth: Upon information and belief that the money maintained as aforesaid on deposit with said bank was not public money of the State of New York or of any of its political subdivisions.

Tenth.—Upon information and belief that from the said 30th day of September, 1929, and on divers dates during the existence of said deposit account, maintained as aforesaid by the defendants and their predecessors, said First National Bank and Trust Company of Yonkers pledged with and to the said City of Yonkers, as security for the
30 repayment of the indebtedness evidenced by said deposit account and as security for the repayment of the indebtednesses evidenced by certain other deposit accounts, certain of the assets of said bank consisting of various and sundry bonds, a schedule of which is attached hereto, marked Exhibit A, and made a part of this complaint, and that the pledge of assets so made to secure the repayment of the indebtedness evidenced by the deposit account maintained as aforesaid by the defendants and their predecessors was unlawful, illegal, null and void.

Eleventh.—Upon information and belief that on divers dates from the said 20th day of March, 1933 to or about the

16th day of December, 1933 the said Conservator and the said successor Conservator recovered from the said City of Yonkers all of the aforesaid assets so pledged with the said City by payments on account of all the aforesaid deposit accounts and on the 26th day of October, 1933 the deposit account maintained as aforesaid by the defendants stood paid out in full. 31

Twelfth.—That under date of December 16, 1933 there was made available to all creditors of the said bank a first dividend of 40% of the amount of their deposits at the time of the bank's suspension. 32

Thirteenth.—That the said payments referred to in paragraph marked "Eleventh" of this complaint on account of the deposit account maintained by the defendants as aforesaid were not ratable with and proportionate to the said dividend made available to the other creditors of the said bank and were illegal, null and void.

Fourteenth.—That there is now justly due and owing from the defendants to the plaintiff the sum of Nine Thousand Nine Hundred Twenty-four and 45/100 ($9,924.45) Dollars representing the difference between the said 40% dividend and the said payments of Sixteen Thousand Five Hundred Forty and 75/100 ($16,540.75) Dollars. 33

Fifteenth.—That no part of said sum has been paid although payment thereof has been duly demanded.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of Nine Thousand Nine Hundred Twenty-four and 45/100 ($9,924.45) Dollars, with interest thereon from the 26th day of October, 1933, besides the costs and disbursements of this action.

BENJAMIN W. MOORE,
Attorney for Plaintiff,
Office & P. O. Address,
30 South Broadway,
Yonkers, New York.

34 *Schedule A, Annexed to Complaint.*

Schedule A.

Description of Assets Pledged	Face Value
Fourth 4¼ Liberty Loan Bonds	$ 40,000.00
Town of Cortland, New York	37,000.00
City of New York, Corp. Stock	10,000.00
Town of Tonawanda, Sewer Bonds	45,000.00
City of Yonkers, School Bonds	10,000.00
United States Fourth Liberty Loan Bonds, 4¼%	15,000.00
State of Arkansas, 4½s, due 1942	50,000.00
Butte, Montana, 6s, due 1941	15,000.00
Charlotte, North Carolina, 4½s, due 1934	5,000.00
Galveston, Texas, 5s, due 1933-1935	12,000.00
Town of Greenburgh, New York, 4½s, due 1946	15,000.00
35 Town of Greenburgh, New York, 4½s, due 1953	5,000.00
Town of Greenburgh, New York, 4½s, due 1954	1,000.00
Town of Huntington, Long Island, 4½s, due 1938	2,000.00
Town of Huntington, Long Island, 4½s, due 1945	2,000.00
Town of Huntington, Long Island, 4½s, due 1946	7,000.00
County of Jefferson, Alabama, 5s, due 1947	15,000.00
State of Louisiana, 4¾s, 1973	10,000.00
State of Louisiana, 4½s, 1953	5,000.00
New Orleans, 4½s, due 1956	5,000.00
City of New York, 4½s, due 1965	10,000.00
Norfolk, Virginia, 4½s, due 1935	10,000.00
Norfolk, Virginia, 4½s, due 1935	15,000.00
State of Oregon, 5½s, due 1937	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
36 State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1946	2,500.00
City of Orlando, Florida, 5½s, due 1952	25,000.00
Portsmouth, Virginia, 5s, due 1954	10,000.00
City and County of San Francisco, 5s, due 1945	10,000.00
Village of Sea Cliff, New York, 5s, due 1933	1,000.00
State of South Dakota, 5s, due 1938	15,000.00
Winston, Salem, North Carolina, 4¾s, due 1936	14,000.00
Canadian, Int. Paper, 6s, due 1949	25,000.00
Comm. of Kentucky, 4½s, due 1950	50,000.00
Town of Lyndhurst, 5½s, due 1934	55,000.00
State of New Mexico, 6s, due 1935	25,000.00
Bay City, 4s, due 1935	3,000.00
Seattle, Washington, 5s, due 1934	6,000.00
Seattle, Washington, 5s, 1940	2,000.00
Teaneck, New Jersey, 4½s, due 1934	25,000.00
Union, 6s, due 1934	25,000.00
Ohio Public Service 6s, due 1953	30,000.00
South Bay Cons. Water Co., 5s, due 1950	10,000.00
Laclede Gas Light Co. 5½s, due 1935	5,000.00
TOTAL FACE VALUE	$692,000.00

(Duly verified by Arthur E. Muth on February 7, 1936.)

37

Answer as Amended by Stipulation, Dated November 24, 1937.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff,

against

38

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

39 The defendants above named by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, for their answer to the plaintiff's complaint, respectfully show and allege:

First.—Deny each and every allegation of said complaint contained in paragraphs marked "Ninth", "Thirteenth", "Fourteenth" and "Fifteenth".

Second.—Deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked "Twelfth".

40 *Answer as Amended by Stipulation, Dated November 24, 1937.*

Third.—Deny each and every allegation contained in paragraph marked "Fourth" except that on the 20th day of March, 1933, there was a credit balance of a certain deposit account, together with accrued interest in said bank amounting to the sum of $16,540.75.

Fourth.—Deny each and every allegation of said complaint contained in paragraph marked "Tenth" except that the plaintiff, his predecessors, conservators and the First National Bank & Trust Company claimed certain
41 securities with the City of Yonkers for said Firemen's Pension Fund account and other indebtedness of the City of Yonkers.

Fourth-A.—Denies each and every allegation contained in paragraph of the complaint numbered "Eleventh".

Fifth.—That upon information and belief that the Exhibit "A" attached to the complaint is not a correct list of securities pledged with the City of Yonkers on or about the 4th day of March, 1933, in that the following bonds were not in the possession of said City:

42

Fourth 4½ Liberty Loan Bonds....	$40,000.00
Town of Cortland, New York.....	37,000.00
City of New York, Corp. Stock....	10,000.00
Town of Tonawanda, Sewer Bonds'	45,000.00
City of Yonkers, School Bonds.....	10,000.00
United States Fourth Liberty Loan Bonds, 4½%.....	15,000.00

Sixth.—Deny each and every allegation of said complaint marked "Sixth" except admits subdivisions 1, 2 and 3.

Answer as Amended by Stipulation, Dated November 24, 1937.

43

Seventh.—Deny each and every allegation of said complaint marked "Seventh" except admits subdivisions 1, 2 and 3. Subdivisions 4 and 5 are herein set forth in defendants Exhibit "A" hereafter attached.

As a first, separate and complete defense thereto, the defendants further allege:

Eighth.—That the City of Yonkers is a municipal corporation organized under the laws of the State of New York, pursuant to Chapter 452 of the Laws of 1908. 44

Ninth.—That the City of Yonkers is a City of the Second Class, pursuant to Chapter 55 of the Laws of 1909 of New York State.

Tenth.—That Local Law No. 2 (1931) of the Local Laws for cities in New York State superseded and amended previous laws in relation to the Firemen's Pension Fund of the City of Yonkers. A copy of said law is annexed hereto and made a part thereof and marked Exhibit "A".

Eleventh.—That upon information and belief that on or before the 4th day of March 1933, the First National Bank & Trust Company in Yonkers had the authority to pledge its assets to secure public money in the State of New York. 45

Twelfth.—That prior to the 20th day of March 1933, the City of Yonkers maintained a general deposit account and numerous other accounts including the Firemen's Pension Fund account in the First National Bank & Trust Company of Yonkers.

Thirteenth.—That prior to the 20th day of March, 1933, the said First National Bank & Trust Company of Yonkers

46 *Answer as Amended by Stipulation, Dated November 24, 1937.*

pledged certain securities with the City of Yonkers as security for the repayment of its deposits with said bank as more clearly shown by plaintiff's Exhibit "A", except as hereinbefore denied.

Fourteenth.—That pursuant to Section 69 of the Second Class Cities Law, Chapter 55 of the Laws of 1909, and amendments thereto, the Board of Estimate and Apportionment had the authority to designate depositories for the City of Yonkers, a copy of which section is attached hereto
47 and made a part hereof, and marked Exhibit "B".

Fifteenth.—That on or about the 10th day of July, 1929, said Board of Estimate and Apportionment of the City of Yonkers designated the First National Bank of Yonkers and the Yonkers Trust Company and others as depositories and fixed the rate of interest to be received, including the Firemen's Pension Fund, by the City Treasurer of Yonkers. A certified copy of said resolution is hereto attached and made a part hereof and marked Exhibit "C".

Sixteenth.—That upon information and belief that on or
48 about the 30th day of September 1929, the Yonkers Trust Company and the First National Bank of Yonkers merged and said merger is filed in the office of the Register of Westchester County in Liber 10 of Miscellaneous Records.

Seventeenth.—That the Firemen's Pension Fund of the City of Yonkers was a public fund of said City.

As a second, separate and complete defense hereto, the defendants further allege:

Eighteenth.—The allegations contained in said answer numbered "Eighth" to "Seventeenth" inclusive, are hereby realleged, with the same force and effect as if stated.

Answer as Amended by Stipulation, Dated November 24, 1937.

49

Nineteenth.—That the defendants at no time as alleged in the said complaint maintained an account known as the Firemen's Pension Fund in the plaintiff bank.

Twentieth.—That the City Treasurer of the City of Yonkers maintained an account in the said bank designated as the Firemen's Pension Fund of the City of Yonkers, prior to the 20th day of March, 1933.

Twenty-first—That the said First National Bank and Trust Company accepted said deposit designated as the 50
Firemen's Pension Fund of the City of Yonkers as public money of the City of Yonkers and pledged its security for the repayment of the same.

As a third, separate and complete defense thereto, the defendants further allege:

Twenty-second.—The allegations contained in said answer numbered "Eighth" to "Twenty-first" inclusive, are herein re-alleged with the same force and effect as if stated.

Twenty-third.—That upon information and belief that 51
on the 20th day of March, 1933, the City of Yonkers held securities for its deposits including the Firemen's Pension Fund of the City of Yonkers, negotiable bonds in the sum of $535,000.00 of the First National Bank & Trust Company of Yonkers.

Twenty-fourth.—That upon information and belief that there was on deposit with the said bank on the 20th day of March, 1933, moneys belonging to the City of Yonkers in deposits, including the Firemen's Pension Fund, the sum of $328,026.04.

52 *Answer as Amended by Stipulation, Dated November 24, 1937.*

Twenty-fifth.—That upon information and belief that prior to the second day of May, 1933, Percival W. Trudeau, as Conservator of the First National Bank & Trust Company of Yonkers, voluntarily released all moneys of the said City of Yonkers, including the Firemen's Pension Fund.

Twenty-sixth.—That upon information and belief the said release of City deposits, including the Firemen's Pension Fund, was made pursuant to instructions of the Comptroller of Currency of the United States, or his deputies.

53

Twenty-seventh.—That upon information and belief that the said City deposits, including the Firemen's Pension Fund, were released only after the opinion was given to the Conservator, Percival W. Trudeau by his attorney.

Twenty-eighth.—That the said City of Yonkers relying upon the voluntary return of all moneys of the said City of Yonkers surrendered to the Conservator of the First National Bank & Trust Company the aforesaid securities in the sum of $535,000.00.

54

Twenty-ninth.—That said payment by the Conservator and his successor was voluntary and without duress or fraud and cannot be recovered back.

As a fourth separate and complete defense thereto, defendant further alleges:

Thirtieth.—That the aforesaid payments to the Firemen's Pension Fund were voluntary payments and at the time of said payments the First National Bank & Trust Company of Yonkers was not insolvent.

WHEREFORE, defendants demand judgment dismissing the complaint, together with costs and disbursements of this action.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendants,
City of Yonkers, Yonkers, N. Y.

(Duly verified by Joseph F. Loehr, James E. Hushion and Dennis M. Morrissey on February 28, 1936.)

56

Exhibit A.

Local Law No. 2-1931 of The City of Yonkers.

(Printed as part of Defendant's Requests for Findings of Fact and Conclusions of Law at page 108 to page 116.)

Exhibit B.

57

Section 69 of the Second Class Cities Law.

(Omitted for brevity; may be found in Public Laws.)

Exhibit C.

Certified Copy of Resolution of Board of Estimate

(Printed as Defendant's Exhibit C-1, page 100.)

58

Stipulation Amending Complaint and Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

59 Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

60

L. 63-188.

The attorney for the plaintiff hereby consents that the defendants' answer be deemed amended so as to include therein a paragraph as follows:

"Fourth-A: Denies each and every allegation contained in the paragraph of the complaint numbered "Eleventh".

The attorney for the defendants stipulates and agrees that in consideration of the above consent by the attorney

for the plaintiff that the plaintiff may, upon the trial of this action, present proof that the payments referred to in paragraph numbered "Eleventh" of the complaint occurred from and after the 3rd day of March, 1933 and the said complaint and answer are hereby deemed to have been amended accordingly.

Dated, November 24, 1937.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Attorney for Defendants.

64 **Bill of Exceptions.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

65 JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

L. 63-188.

BE IT REMEMBERED that at a stated Term of the District
66 Court of the United States for the Southern District of New York on January 4, 1938, before the Honorable John Knight, United States District Judge for the Western District of New York, then sitting in and for the Southern District of New York, presiding, the following proceedings were had:

Appearances:

BENJAMIN W. MOORE, Esq., and MILTON L. ROMM, Esq., Attorneys and Counsel for Plaintiff.

LEONARD G. MCANENY, Esq., Corporation Counsel of the City of Yonkers; MORRIS ROSENWASSER, Esq., First Assistant Corporation Counsel; and HAROLD T. GARRITY, Esq., Assistant Corporation Counsel, Attorneys and Counsel for Defendants.

The Court: Do I understand correctly that in each of the cases the jury issue is to be waived? 67

Mr. Moore: That is correct. Is that right, Mr. McAneny?

Mr. McAneny: Yes.

Mr. Moore: The jury is waived.

The Court: The stenographer will note the stipulation then. That is true as to each one of the cases. The case with the lowest number is to be tried first.

Mr. Moore: That is Case L. 63-188.

Mr. McAneny: The Firemen's Pension Fund. Before we proceed, there is an order entered in this case amending the answer. I think it affects certain of the issues, and I think counsel for the plaintiff will agree that it may be submitted and marked in evidence. 68

Mr. Moore: Yes. I will agree as to that. There is a stipulation also entered into to be offered in evidence.

Mr. McAneny: Yes.

The Court: The amended answer is on file, is it not?

Mr. McAneny: I would like to have it on the record.

Mr. Moore: I will consent that any amendment to the answer, in compliance with the stipulation, may be filed.

The Court: The amended answer has not been filed. The stipulation covers this. I wish you would state just what is the issue involved, ~~in~~ an opening. 69

Mr. Moore: This action is brought by the Receiver of the First National Bank and Trust Company of Yonkers to recover alleged preferences which were paid out during the closing of the bank to the Firemen's Pension Fund of the City of Yonkers. The bank had put up as security for deposits with the City of Yonkers some 560-odd thousand dollars worth of bonds. I am not sure of the exact amount. After the bank closed and from the date of the closing right down through to the two conservatorships the City had withdrawn all its funds in all four accounts and had re-

turned to the bank the security or the bonds which the bank had put up as collateral security. Of course those bonds were bonds that were purchased by the bank with the depositors' money, and we claim that the act in putting up the bonds was *ultra vires*, and the City in receiving 100 per cent received an illegal preference over the other depositors in the bank. We are now seeking to recover the overdraft that they made, which we call an illegal preference. I think this will be unfolded as we proceed with the trial.

The Court: It involves one of the special funds, the so-called Firemen's Fund?

71 Mr. Moore: This involves the Firemen's Pension Fund of the City of Yonkers.

The Court: What is the amount that is involved?

Mr. Moore: $16,590.75.

The Court: It says $9,924.45.

Mr. Moore: That was the orginal amount, and one-half of that, with interest added to it, brings it up to that amount.

The Court: $16,000.

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72 Walter F. Downey, the plaintiff herein, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Mr. Moore: I first offer in evidence a certified copy of Mr. Downey's commission as Receiver of the First National Bank and Trust Company. Is there any objection to that?

Mr. Garrity: No objection.

(Marked Plaintiff's Exhibit No. 1.)

Q. Have you qualified as Receiver of the First National Bank and Trust Company of Yonkers and are you now acting as such Receiver? A. Yes.

Q. Are you in charge of the liquidation of that bank? A. Yes.

Q. What is the official date of the bank's closing?

Mr. McAneny: I object to that as calling for a conclusion and not a statement of fact. There is no official date of the bank's closing. It is a matter of proof that the bank ever did close within the contemplation of the law. 74

Mr. Moore: I withdraw that question.

Q. Do you know from an examination of the books and records of the bank the date of the bank's closing?

Mr. McAneny: I object to that on the same ground. The witness is not qualified to answer that question. It is a question of fact to be proved in this case.

Mr. Moore: I have the proclamation of the Governor and the Comptroller that I am going to introduce in evidence as I go along with this witness.

Mr. McAneny: The books and records and documents may be introduced in the case if they are relevant, and from those the question of law can be deduced, but this witness is being asked a question of law. I therefore object on the ground that it is such a question that he is not qualified to answer. I think it is not the best proof to be offered as to any closing. 75

The Court: Is the question of the date material?

Mr. Moore: I withdraw that question, your Honor. I will take it up with another witness.

76 *Walter F. Downey, Plaintiff—Direct.*

Q. As to what date was the claim of general depositors calculated and allowed? A. As of the close of business of March 3rd.

Mr. McAneny: I object to that statement "as of the close of business." This witness is not qualified to answer these questions. He has been around for several months, from November 15, 1937. All these are matters of record and not dependent on the answers of this witness. We are entitled to question all of those facts, if they are submitted as facts.

77 The Court: I think you can first show the date of the closing of the bank in the regular order.

Mr. Moore: He is the man that is liquidating the bank. He has a right to tell as to what time the claims of the general depositors were calculated and allowed. That is the best evidence.

Mr. McAneny: He can state it but he cannot characterize the evidence.

Q. What was the date? A. The close of business of March 3, 1933.

Mr. McAneny: I object to the "close of business."

78

Q. It was on March 3, 1933; is that correct? A. It was the close of business of March 3, 1933.

Mr. McAneny: I object to that statement as characterizing the evidence.

The Court: He is asking him now merely as to the time.

Mr. Moore: The time the claims of general depositors was calculated and allowed.

The Court: March 3, 1932?

The Witness: 1933.

Q. As of what time were the set-offs calculated and allowed? A. March 3, 1933.

Q. As of what time is the interest on interest-bearing deposits allowed? A. March 3, 1933.

Q. There was a first dividend of 40 per cent made available to the general depositors? A. Yes.

Q. On what date? A. December 16, 1933.

Q. Was a second dividend of 10 per cent made available to the general depositors? A. Yes.

Q. On what date? A. November 3, 1937.

Mr. Moore: I want to now offer in evidence and 80
read in evidence Section 2, Article XII, of the City of Yonkers, Laws of 1908, Chapter 452.

Before I offer those in evidence, you may cross-examine, Mr. McAneny.

Mr. McAneny: Are you through?

Mr. Moore: Yes. I am going to offer some things in evidence.

Cross examination by Mr. McAneny:

Q. The statement you have made with reference to certain dates are not within your own knowledge, are they, Mr. Downey? A. They are from instructions from the 81
Comptroller of the Currency in a letter stating those dates, Mr. McAneny.

Q. That is the source of your information? A. Yes, sir.

Q. When did you first come to Yonkers? A. Well, I came to Yonkers for one day prior to November 15, 1937.

Q. But you were not officially connected with this bank prior to that date, were you? A. No, I was not.

Q. You have had no official acts with respect to this bank prior to November, 1937? A. No. Only, Mr. McAneny, in connection with my position in Washington as Personnel Officer of the Division of Insolvent National Banks. Those

82 *Walter F. Downey, Plaintiff—Cross.*

were matters relating to personnel matters in connection with the affairs of the trust company.

Mr. McAneny: That is all.

Mr. Moore: That is all. I want to read in evidence——

The Court: That commission is dated November 15, 1937?

Mr. Moore: November 15, 1937.

I want to read into the record Section 2 of Article XII, of the Supplemental Charter of the City of
83 Yonkers, Laws of 1908, Chapter 452 (reading):

(Omitted for brevity; may be found in Public Laws of New York.)

The Court: What year is that act?

Mr. Moore: 1908.

Mr. McAneny: I move to strike that out. The whole act has been superseded by the Local Law of the City of Yonkers.

The Court: I will let it stand for the present.

Mr. Moore: I offer in evidence and want to read into evidence Local Law No. 2 of 1931 of the City
84 of Yonkers.

Mr. McAneny: If the Court please, Subdivision 5, as read, is not as it appears in the original charter.

Mr. Moore: It appears in the official book. I have read it from the book.

Mr. McAneny: What book are you reading from?

Mr. Moore: From the Laws of New York, Official Series 131, Session of 1908, Volume 2.

Mr. McAneny: That has been amended all the way up.

Mr. Moore: You can point that out. Section 1 and 2 of Local Law No. 2 of the City of Yonkers——

The Court: Are those numbered Local Laws 1 and 2?

Mr. Moore: Sections 1 and 2 of Local Law No. 2, 1931, City of Yonkers.

The Court: All right.

Mr. Moore: (Reading):

(Printed as part of Defendants' Requests for findings of fact and Conclusions of Law, page 108 to page 111.)

I would like to read into the record this Article 86
III-A.

Mr. McAneny: If the law is being offered, it should be offered as a whole. If it is read into the record, it seems to me the whole of it should be read into the record.

Mr. Moore: There are only certain parts that are necessary.

The Court: I will let him read those parts that he desires. You may offer the rest of it later on.

Mr. Moore: You can offer the rest of it, if you want to.

Mr. McAneny: As I understand it, it being the local law of the City and it having been so conceded 87
by the counsel for plaintiff, the Court can take judicial notice of the entire law.

The Court: What is the purpose?

Mr. Moore: I want to read Article III-A of the Laws of New York, 1933 (reading):

(Omitted for brevity; may be found in Laws of New York, Chap. 667, Art. III A, 1933.)

I would like to call Mr. Power to the stand.

88 *John B. Power, for Plaintiff—Direct.*

JOHN B. POWER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Moore.

The Court: Before we proceed, let me ask one question: A question is raised here in reference to the proof of the appointment of the Receiver. I do not see that the third paragraph of the complaint is denied.

Mr. Moore: It is not denied.

89 The Court: It is not denied, as I take it.

Mr. Garrity: It was not a question of his appointment. It was a fixed date. I think he was appointed November 15, 1937.

The Court: I see in the third paragraph that it is alleged that on the 20th day of March, 1933, the Comptroller of the Currency of the United States acting under and pursuant to the Bank Conservation Act enacted by the Congress of the United States on March 9, 1933, duly appointed Percival W. Trudeau as Conservator of the said First National Bank and Trust Company of Yonkers. That is in March, 1933.

90 Would not that fix the date of the closing of the bank?

Mr. Romm: That is not denied. That is why we did not bother proving it.

The Court: Some question was raised here as to the proof with reference to the date of closing of the bank.

Mr. Moore: I think I will clear it up with this witness and some other records.

The Court: I do not know that it is essential to prove that in view of the pleadings.

Q. Mr. Power, what is your present employment? A. I am a clerk in the employ of the Receiver of the First National Bank and Trust Company of Yonkers, in liquidation.

Q. Were you employed by the First National Bank and Trust Company of Yonkers? A. I was.

Q. For how long? A. Since October 1, 1929.

Q. What position did you hold there? A. Assistant cashier.

Q. Did you continue in the employment of the Conservator and of the Receiver? A. I did. 92

Q. Do you recall March 4, 1933? A. I do.

Q. On what day of the week was that? A. On Saturday.

Q. Was the bank open for any kind of business on that day? A. No.

Mr. Moore: I want to offer in evidence a certified copy of the order of the Governor of the State of New York relating to the bank holiday, a proclamation, rather.

Mr. Romm: No objection to the proclamation of March 4th.

(Marked Plaintiff's Exhibit No. 2.) 93

Mr. Moore: Proclamation of the Governor of March 6th is offered and there is no objection to it.

(Marked Plaintiff's Exhibit No. 3.)

Q. Until what date did the bank continue closed for all business? A. Until March 10, 1933.

Q. Was any business at all transacted between March 4th and March 9th, inclusive? A. No.

Q. What type of business was transacted in the bank on March 10, 1933? A. Restricted business.

94 *John B. Power, for Plaintiff—Direct.*

Mr. McAneny: I object to that as not responsive.

The Court: Sustained.

Mr. Moore: Sustained; exception.

A. Notes could be——

Mr. Moore: He sustained the objection.

The Court: I will strike out the answer. Your inquiry was what business was done after March 9th or March 10th?

Mr. Moore: Yes.

95 Q. Did the bank ever reopen for regular business? A. No.

Mr. McAneny: I object to that as calling for a conclusion also.

Q. You were there all the time, were you not? A. I was.

Mr. McAneny: He can state what happened in the bank and what was done, but to characterize it is not within his province.

Mr. Moore: He knows of his own knowledge.

The Court: What is the significance of this evi-
96 dence as to those dates? As to the nature of the transactions of the bank or the time of its closing, do those concern the issues here?

Mr. McAneny: I think there is a very important issue as to the question of solvency. I think that is a question that is to be proved in this case.

The Court: I do not know whether the question of what was done or as to the closing of the bank and what business they did during that period, I do not know whether that would be material.

Mr. McAneny: I do not think it is material.

The Court: I think we ought to get along with the testimony as best we can.

Mr. Moore: I want to mark the Firemen's Pension Fund ledger, this book, for identification.

(Marked Plaintiff's Exhibit 4 for identification.)

Q. I show you this book and ask you if that is the Firemen's Pension Fund ledger?

Mr. McAneny: Is that the book of the bank?

Mr. Moore: Yes. I am just having it marked for identification. You can see it in just a moment.

A. I can, Judge. 98

Q. I ask you if that is the Firemen's Pension Fund ledger in the bank? A. It is, yes.

Q. Was Plaintiff's Exhibit No. 4 marked for identification a record made in the regular course of the bank's business?

Mr. McAneny: I object to that question. Did he make the record? Did you keep the book?

The Witness: Shall I answer?

Mr. Moore: Yes.

The Witness: No, I did not keep the book.

99

Q. But you are familiar with the books? A. I am.

Q. Was that book which is marked for identification made in the regular course of the bank's business? A. It was.

Mr. McAneny: I object to that, if your Honor please. The witness is not competent to answer.

The Court: Let's see the source of his knowledge. What is your position with the bank? I do not recall it.

The Witness: I was assistant cashier.

The Court: What did your duties as such include?

100 *John B. Power, for Plaintiff—Direct.*

The Witness: Most everything in general. I had access to most everything.

The Court: I will let him state.

(Record read by the stenographer.)

Q. Was it in the regular course of the bank's business to have these records made on the day when the transactions described in them occurred?

Mr. McAneny: I object to this line of questioning unless the person is produced who kept this book?

101 The Court: I think it is a little different inquiry. He is not inquiring as to the specific things done, but as to the course of business of the bank, whether it was making the entries on certain dates or otherwise.

Mr. McAneny: I do not see, if your Honor please, just how that affects what the entries in this book may be or may not be, because here is a book produced and evidently they are relying on it. I would like to cross examine as to the entries and cross examine the proper person. I think it is irrelevant. I object to it on that ground.

102 The Court: I think it is competent as showing the general practice.

Mr. Moore: The general practice of the bank and what they did with these records. This man who was one of the officers in the bank knew the customs and practices of the bank. That is the way we always prove those matters.

The Court: I will receive it, with an exception to the defendants. You may inquire as to it.

Mr. Moore: I offer Plaintiff's Exhibit 4 marked for identification in evidence.

Mr. McAneny: I object to that on the ground that it is not proved and no foundation has been laid for the receiving of this book up to the present time.

The Court: Overruled.

Mr. McAneny: Exception.

(Plaintiff's Exhibit No. 4 for identification received in evidence.)

Mr. Moore: You may ask, Mr. McAneny.

Mr. Garrity: May I have that book?

Mr. Moore: Yes, certainly (handing).

Cross examination by Mr. McAneny:

Q. Will you take this book, Mr. Power? Did you make 104
the entries in that book (handing to witness)? A. No.

Q. Do you know who did? A. No.

Q. You mean to say you have been so closely associated with the bank and yet you do not know the individual that kept that book? A. That is correct.

Q. It might have been made by a number of people? A. The party who was in charge of the bookkeeping department.

Q. Who was that? A. Mr. Spyce.

Q. What is his first name? A. Louis.

Q. Is he living now? A. Yes.

Q. He is not in court, is he? A. No. 105

Q. The books purport to contain certain entries under the heading "Yonkers Firemen's Pension Fund"? A. "Firemen's Pension Fund, City of Yonkers."

Q. So far as that book shows, what are the dates covering those entries? A. From March 1, 1933 to October 26, 1933.

Q. Does that book purport to show the receipts and disbursements? A. It does.

Q. Does it include debit items in the accounts of depositors? A. That is right.

Q. What is the source of those items? How are they put into that book? A. I do not quite get your question.

Q. You say that book is kept by an individual? A. That is right.

Q. Where does he get the items that he puts into that book? A. From his checks or deposits.

Q. You mean the checks drawn against that account? A. That is right.

Q. Those checks are the original items and they are the original entries in that account, are they not? A. Yes.

Q. Have you in your possession any checks that were paid out of that account? A. No.

107 Q. Are any of the moneys in that account paid directly to the depositors? A. I could not say. I have not the checks.

Q. The checks would indicate that? A. Yes.

Q. You do not know of your own knowledge? A. No.

Q. All you know is that it is a book of the bank? A. Yes.

Q. You have absolutely no personal knowledge whatever? A. As to what?

Q. As to the nature of the entries and what the original source of information was from which those entries were made? A. The nature of the entries were checks.

Q. How do you know that? A. That is in the general course of business of the bank.

108 Q. You did not see the checks entered there, did you? A. Not personally, no.

Q. You have not produced any of those checks here, have you? A. No.

Q. What is that account captioned in that book? A. "Firemen's Pension Fund, City of Yonkers."

Q. I hand you certain drafts or checks and ask you to examine them and tell me whether those checks were paid by the bank out of the fund that you have been referring to (handing to witness)? A. Do you want me to examine each check?

Mr. Moore: Do you want him to examine each check, he says?

Mr. McAneny: Yes.

The Court: Can we stipulate as to that? Is there any question about it?

Mr. Romm: We have never seen them.

Mr. Moore: He wants them returned a moment.

Q. Yes. I would like to have you examine them and go over them and tell me if those checks were drawn on that account?

Mr. Romm: Take your time and examine each one. (Handing to witnesss.)

Mr. Moore: Have you completed your examination?

The Witness: I have to question one check, Judge.

Q. Are all of the others all right? A. Yes. I am not sure how these are handled.

Q. Describe that check. A. It says "Paid by Check 47." It was probably a Conservator's check given in lieu of it. As to all the other checks——

Q. They all went through the bank? A. Yes.

Q. In the form as indicated? A. Yes.

Q. These checks on the reverse side indicate the date upon which they were paid by the bank? A. The cancellation would show that.

Q. Shown on each check? A. I suppose so. I did not look them over to see if that is right. All checks are cancelled with the exception of two.

Q. Which two are they? A. One check payable to Mary Powers, dated April 29, 1933.

Q. That was never cancelled? A. That was never cancelled by the bank.

112 *John B. Power, for Plaintiff—Cross.*

Q. Did it go through the bank? A. It is evident that a check was given in place of this, a Conservator's check.

The Court: That is the one you referred to?

The Witness: Yes. A $50 check.

Q. How did you say that check was made out? A. Mary Powers.

Q. Mary Powers? A. That is right.

Q. That is not indicated on the book as having gone through the bank? A. I have no way of checking that.

113 Q. But all the others there indicate by dates the cancellation? A. With the exception of another $50 check.

Q. Which one is that? A. Payable to Mary Powers.

Q. Two checks payable to Mary Powers? A. That is correct.

Q. Those evidently, as far as you can see, did not go through the bank? A. On one check I can identify a stamp of one of our tellers at the time. Each teller used a stamp whenever cashing a check, and I can identify that stamp, the rubber stamp, with a "K," a fellow by the name of Ketcham.

Q. You identify that stamp on those two checks of Mary

114 Powers? A. On one I do.

Q. So one of them went through the bank? A. This check, it went through the bank.

Q. The other you could not be sure about? A. I could not be sure about it.

Q. Is that the only check that you are not sure that went through the bank? A. That did not show a cancellation.

Q. And the bank paid out money to the holders of those checks, as indicated; is that correct? A. No, I could not swear to that.

Q. Can you look at a check and indicate to me that it was paid? A. Yes.

Q. All right. Look through them and tell me. Identify any of those checks which you say were not paid in due course by the bank, according to the tenor of the check. A. Mary Powers, two of them.

Q. That is all? A. That is all.

Q. The others were paid? A. The others were paid.

By Mr. Moore:

Q. Do you know to who they were paid? A. They all state on here to whom they were paid.

Q. I thought you said you had no way of telling whether 116
the payee received the money or not. A. On those checks, Judge.

By Mr. McAneny:

Q. In connection with the deposit items in that account, who made those deposits? They were made by the City of Yonkers? A. They were made by the City of Yonkers to the Firemen's Pension Fund, as far as I can see.

Q. Each one of those checks that went through the bank bears on it "City of Yonkers, Firemen's Pension Fund"? A. That is correct.

Mr. McAneny: I would like to have those checks, 117
I think they number about 100, marked as one exhibit for identificatfon.

The Court: Yes.

(Marked Defendants' Exhibit A for identification.)

Mr. McAneny: Consisting of approximately 100 checks.

Mr. Romm: Have you counted them?

The Witness: No.

Mr. McAneny: (To the Clerk.) Perhaps you better count them.

118 *Carl H. Vanvick, for Plaintiff—Direct.*

The Clerk of the Court: 117.

Mr. Moore: 117, he says, approximately.

The Court: Those are considered as Defendants' Exhibit A for identification.

Mr. McAneny: There being no objection to putting those in evidence at this time, I offer them in evidence, since we are trying this without a jury.

Mr. Moore: No objection at all.

(Defendants' Exhibit A for identification received in evidence.)

119 Mr. McAneny: That is all.

(Witness excused.)

CARL H. VANVICK, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Q. Mr. Vanvick, are you employed by Walter F. Downey, Receiver of the First National Bank and Trust Company of Yonkers? A. I am.

120 Q. In what capacity are you employed? A. Auditor in charge of the books and records and matters pertaining to the claims.

Q. Were you employed by the Receiver prior to Mr. Downey's becoming appointed Receiver? A. Yes.

Q. How long have you held the position of auditor with the receivership? A. Since April 16, 1934.

Q. Will you tell us what experience you have had, Mr. Vanvick, as auditor, banking exeperience? A. I worked in the First National Bank, Sioux City, Iowa, from 1923 to 1930 in various capacities, the last position being auditor and transit manager. The bank closed in 1930. I immediately went to work for the receiver of the bank and was in

his employ until June, 1932, when the receiver and I were transferred to New Haven to take over the National Tradesmen Bank and Trust Company of New Haven. I kept up all records, the receivership books, and was in his employ until August, 1933, and that bank was reorganized. From there I went to the office of the Comptroller of the Currency in Washington and was there for two months, when they sent me out on the road setting up receivership books of various receiverships. I spent four months in Grand Rapids, Michigan, setting up the books and records of the Grand Rapids National Bank, Grand Rapids, Michigan. From there they transferred me to Vermont, where I set up four different receivership books.

April 16, 1934 was my last experience in setting up records. That was with the First National Bank and Trust Company.

Q. That was when you came with the First National Bank and Trust Company? A. Yes.

Q. Are you familiar with the ledger and records of that bank? A. Yes.

Q. Are you familiar as to what time the claims of general depositors was calculated and allowed? A. Yes.

Q. From what date? A. The close of business, March 3, 1933.

Mr. McAneny: I object to the chacterization of "close of business."

The Court: I will allow it.

Mr. McAneny: Exception.

Mr. Moore: I think this establishes the closing of the bank, the date.

Mr. McAneny: This man can only testify as to what the book shows, and he cannot characterize it.

The Court: The date appears. He can calculate it from a certain date.

124 *Carl H. Vanvick, for Plaintiff—Direct.*

Q. What date did you say? A. March 3, 1933.

Q. Can you tell us as of what time the set-offs were calculated and allowed? A. March 3, 1933.

Q. As of what time is interest on the interest-bearing deposits allowed? A. From what time or to what time?

Q. From what time? A. Interest ceased at the close of business, March 3, 1933.

Mr. McAneny: I object to the "close of business."

The Court: Strike out the words "close of business." It ceased March 3, 1933?

125 The Witness: That is right.

Q. Do the bank records show a deposit account maintained under the name of the Firemen's Pension Fund? A. Yes.

Mr. McAneny: I object to that on the ground that the account has already been identified as the City of Yonkers, Firemen's Pension Fund.

The Court: Overruled.

Mr. McAneny: Exception.

Q. Was that account an interest-bearing checking account?

126 The Court: The Firemen's Fund deposits?

Mr. Moore: Yes; the Firemen's Pension Fund.

A. Referring to the record of the account, there appears no deposit, so I cannot determine from this ledger:

Q. Whether it was interest-bearing? A. Whether it was interest bearing or not.

Q. What was the balance, together with the accrued interest, at the close of business—what was the balance at the close of the day on March 3, 1933? A. The record shows $16,590.75.

The Court: How much is that?

The Witness: $16,590.75.

Q. When did the first withdrawal from the account occur after March 3, 1933? A. March 18, 1933.

Q. How much was withdrawn from the account on that date? A. $100.

Q. What is the interest due on that withdrawal from that date down to the present time? A. $18.97.

Q. On what basis did you calculate that interest? A. The legal rate of 6 per cent from March 3, 1933, to December 16, 1933 on $100. 128

Q. Is that March 18, 1933? A. From March 18, 1933 to December 16, 1933, on 60 per cent of the withdrawals, or $60. From December 16, 1933, to November 3, 1937, then on 50 per cent, or $50; from November 3, 1937 to January 3, 1938.

Q. Have you used the same basis in all of your calculations? A. I have.

Q. When did the next withdrawal from the account occur? A. March 20, 1933.

Q. How much was withdrawn from the account on that date? A. $50.

Q. What is the interest on that withdrawal? A. $9.47. 129

Q. That was arrived at in the same way that the other interest amount was arrived at? A. Yes.

Q. When did the next withdrawal from the account occur? A. March 28, 1933.

Q. How much was withdrawn on that date? A. $37.50.

Q. Have you there before you a complete account of the withdrawals and date of withdrawals and the interest figured on the withdrawals right down to date? A. I have.

Mr. Moore: Have you any objection to him reading them in evidence?

130 *Carl H. Vanvick, for Plaintiff—Direct.*

Mr. McAneny: Except subject to my motion to strike out as being irrelevant.

The Court: If it does not correspond with the book?

Mr. McAneny: And subject to any motion I want to make.

The Court: Yes.

Q. Will you just give us the amount that was withdrawn and on what date and the interest shown on the paper that you have prepared so we can have a record of it?

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The Court: And the total.

Q. (Continuing) The total of the interest that we claim is due.

The Court: Also the total withdrawals.

Mr. Moore: Yes, the total withdrawals and the dates.

The Court: The dates.

Q. (Continuing) I want the dates, the amounts of withdrawals, and the interest as you figured it in the first two withdrawals you have told us about. A. Aggregate amount of interest due?

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Q. Yes, down to the present time. A. March 31, 1933, withdrawal of $220.83; interest due, $41.40.

April 1, 1933, withdrawal of $2,358.89; interest due, $441.93.

April 3, 1933, withdrawal of $1,925; interest due, $360.01.

Mr. McAneny: He says "interest due." You mean in accordance with your calculation?

The Witness: Yes.

The Court: Interest computed.

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Mr. McAneny: That would be better, interest computed.

A. (Continuing) April 4, 1933, withdrawals of 304.17; interest computed, $56.84.

April 5, 1933, withdrawals of $343.75; interest computed to be $64.17.

April 6, 1933, withdrawals of $150; interest computed to be $67.98.

April 7, 1933, withdrawals of $197.91; interest computed to be $36.88.

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April 10, 1933, withdrawals of $102.08; interest computed to be $18.99.

April 13, 1933, withdrawals of $95.83; interest computed to be $17.76.

April 29, 1933, withdrawals of $104.17; interest computed to be $19.05.

May 1, 1933, withdrawals of $2,341.68; interest computed to be $427.16.

May 2, 1933, withdrawals of $1,002.09; interest computed to be $182.64.

May 3, 1933, withdrawals of $6,219.36; interest computed to be $1,132.47.

May 4, 1933, withdrawals of $691.66; interest computed to be $125.84.

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May 6, 1933, withdrawals of $195.83; interest computed to be $35.56.

May 8, 1933, withdrawals of $50; interest computed to be $9.06.

May 9, 1933, withdrawals of $50; interest computed to be $9.06.

October 26, 1933, withdrawals of $50; interest computed to be $7.66.

The aggregate calculation of interest is $3,049.95.

136 *Carl H. Vanvick, for Plaintiff—Cross.*

Q. Will you give us the total amount of withdrawals?
A. The total amount of withdrawals was $16,590.75.
Q. How much is half of that? A. $8,295.38.

Mr. Moore: You may examine.

Cross examination by Mr. McAneny:

Q. When you speak of withdrawals, you mean the moneys paid by the bank on the checks that are now in evidence; is that correct? A. That is right.

137 Mr. McAneny: That is all.

Mr. Moore: Mr. McAneny, will you stipulate that during the existence of the Firemen's Pension Fund account the bank pledged with the City of Yonkers as security for the repayment of the account and security for certain other accounts bank assets consisting of various bonds?

Mr. McAneny: I prefer that you put them in the record.

The Court: They are specified in your complaint there.

Mr. Moore: Yes, they are specified in the complaint.

138 The Court: Some of them are disputed?

Mr. Romm: We have a schedule of the bonds which conforms to the City's answer. There is no dispute about it now.

Mr. Moore: This conforms to your answer?

Mr. McAneny: I think they do.

Mr. Garrity: Pledged with the City of Yonkers.

Mr. Moore: I offer in evidence a schedule of the assets of the First National Bank and Trust Company of Yonkers pledged with the City of Yonkers.

Mr. McAneny: I object to that as not proved.

Mr. Moore: All right.

(Discussion between counsel off the record.)

Mr. Romm: That conforms with your claims in the answer. It schedules the items the City said were not pledged.

Mr. McAneny: Yes.

(Marked Plaintiff's Exhibit No. 5.)

Mr. McAneny: It is understood that that pledge covers this fund; is that so?

Mr. Moore: Yes.

The Court: The amount given here is $535,000.

Mr. Moore: Mr. McAneny, will you stipulate that the pledge of the assets by the First National Bank and Trust Company of Yonkers to secure the deposit account captioned "Firemen's Pension Fund," as shown in Plaintiff's Exhibit 5 in evidence, was not made pursuant to or under any statute of the State of New York and was not made pursuant to or under any local law or ordinance of the City of Yonkers?

Mr. McAneny: Certainly not.

Mr. Moore: That is all, Mr. Vanvick.

(Witness excused.)

Mr. Moore: The plaintiff rests.

The Court: The plaintiff rests.

Mr. McAneny: I move to dismiss the complaint on the ground that the plaintiff has set forth and proved no facts sufficient to constitute a cause of action in this proceeding. There was absolutely no proof of insolvency. Furthermore, under the existing law and decisions with respect to a situation such as this, these moneys were paid out by the bank in due course, apparently, and there has been absolutely no demand ever made for the return of these moneys at any time. Certainly on that point alone

142 *Motion to Dismiss the Complaint:*

the plaintiff has failed to make out a case, inasmuch as Section 244 of the Second Class Cities Law and Section 64 of that Law, and other laws applicable to the City of Yonkers, require that before any claim or any judgment can be entered against the City a claim must be duly filed in accordance with the provisions of those laws.

The case as it exists is simply a case of a bank having to make payments, not to the depositor, but to outside parties, and having honored the checks, 143 having never made any demand for the return of the money, and having shown no reason for such return so far as this defendant is concerned, in view of the fact that the plaintiff is demanding the return of the moneys apparently on the ground of insolvency. I do not know of any other grounds. And having failed to prove insolvency, the plaintiff is out of court on that point.

I therefore ask that your Honor dismiss the complaint. The law also requires, the State Law, notice of intention to sue, and that action must be commenced within one year after such notice is filed.

144 The Court: What do you say on the question of notice?

Mr. Romm: Our position is that the sections cited by counsel for the City do not refer to a claim of the kind in suit. They refer more specifically to claims for work done for the City, personal injury accidents, property suits, and so forth, and not a claim of the character we are suing on.

The Court: They do specify the particular nature of the claims?

Mr. Romm: As I recall it—I have not read those sections within recent times—it might be worth while to look at them, if your Honor sees fit to do so.

The Court: I will see what the defendant claims as to that. What is the provision as to the presentation of claims? 145

Mr. Rosenwasser: Section 244 of the Second Class Cities Law of the State of New York reads as follows:

(Omitted for brevity.)

I am reading the entire section.

The Court: Do you have anything about any general provision? 146

Mr. Rosenwasser: I have not read it all. (Reading):

(Omitted for brevity.)

That is all from Section 244.

Then there is Section 64, entitled (reading):

(Omitted for brevity.)

Mr. Romm: As to Section 244 of the Second Class Cities Law, which was read by Judge Rosenwasser, it seems apparent from a reading of it that that specifically applies to injuries to persons or property arising from negligence. 147

The Court: That section does not apply. How about 64?

Mr. Romm: The last one, Section 64 of the Second Class Cities Law, that does not apply to the plaintiff at all, your Honor, because it states, in substance, that a claim must be filed with the proper bodies or officers of the City after the claim has been approved, or, rather, after the claim has been approved by a head of the department or officer of the city who hired the claimant. In other words, by those words it could not possibly apply to the plain-

tiff in this case, because manifestly there is no officer or head of any department in the City of Yonkers who would approve our claim so we could file it with the proper authorities. That section applies to situations where a man does work of some kind for the City of Yonkers or supplies material to it.

And, further, you see that this amounts to a failure to file a claim by giving notice, which is for the first time stated by the corporation counsel in his motion, has never been set up, and that is necessary to this suit. It is our position that it is well established that a defense of that kind must be affirmatively pleaded so it could be heard by the Court.

Mr. McAneny: The complaint alleges that there has been a due demand. That is denied, absolutely, which gives an absolute issue on that point. There has not been any demand even proved in this case.

Mr. Romm: Letters have been sent.

Mr. McAneny: I move to strike that out.

The Court: What is that?

Mr. McAneny: I move to strike out the remark of counsel that letters have been sent.

Mr. Romm: And mailed to the defendants.

Mr. McAneny: Do not interrupt me.

Mr. Romm: I was trying to answer the Judge.

The Court: Let the Corporation Counsel proceed.

Mr. McAneny: You did allege due demand. It was denied. You have proved no demand whatever, and, furthermore, you proved no due demand under the law.

The Court of Appeals has held that that provision which bases a claim against the city applies to every kind of action, legal or equitable. The case of *Thomann* v. *The City of Rochester*, 256 N. Y. 165,

disposes of that question and the City cannot be held liable without such a claim except on a fixed claim, fixed by contract or a fixed salary or fixed in some way so that the comptroller might be mandamused to pay it; that on any claim upon which there is no fixed liability, upon which a mandamus would not lie, it is required by law that a claim be made.

No such claim has been made in this case and no demand whatsoever. I think if your Honor will read that case I just cited and others we are going 152
to submit to you you will find that that is a fatal defect in the plaintiff's case. The proof of filing the claim is a condition precedent which does not require that it be set up affirmatively. That is one of the points upon which we argue.

We further argue that there has been no insolvency shown, as against the defendants in this action. No insolvency, under the National Banking Law, may be deemed to exist with reference to the ordinary transactions of a bank, that is to say, as between the bank and its depositors. This money is in the bank and they may have closed down and paid it out. It is necessary that they show as a matter of fact that 153
it was paid out while it was actually insolvent. We do not admit that the bank was ever insolvent or that it is insolvent today, as a matter of fact.

Furthermore, we move to dismiss on the ground that the plaintiff would not be entitled to recover anything without a tender back of the securities.

The Court: Would not it be better to withhold action on your motion?

Mr. McAneny: I think so, so that we can submit a brief on the law.

154 *Stephen A. Roake, for Defendants—Direct.*

The Court: So we can dispose of these questions. It does involve a question of a claim and presentation of a claim. So I think it is better to withhold my decision on your motion for the present and hear the defendants' case. It probably won't be very long.

Mr. McAneny: You reserve decision?

The Court: Yes, I reserve decision.

Mr. McAneny: Shall we take an adjournment at this point?

The Court: Yes, two o'clock.

155 (Recess to 2:00 P. M.)

AFTERNOON SESSION.

2:00 P. M.

STEPHEN A. ROAKE, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. McAneny:

156 Q. Mr. Roake, are you an official connected with the City of Yonkers? A. I am.

Q. In what capacity? A. Assistant Cashier, Department of Finance.

Q. How long have you held that position? A. Well, as assistant cashier, I have been in that capacity since about 1922 or 1923.

Q. Continuously up to the present time? A. That is right.

Q. Who in the Department of Finance has charge of Firemen's Pension matters, including deposits and withdrawals? A. I have.

Q. For how long have you had that position? A. Ever since I have been assistant cashier.

Q. You now are doing that work? A. Yes, sir.

Q. You are familiar with all the facts with regard to deposits and withdrawals? A. I am.

Q. Can you tell me what the last deposit was that was made in the First National Bank and Trust Company on account of the Firemen's Pension Fund prior to March 3, 1933? A. On February 28, 1933.

Q. I show you a check and I ask you if that represents the deposit that you refer to? A. Yes, sir. 158

Q. What is the amount of that check? A. $15,570.06.

Q. Was that the last deposit that was made in that fund? A. That was the last deposit made in the bank in that fund.

Q. Will you tell me what that check represents? A. That check is the 1932 contribution by the City to the Firemen's Pension Fund. It represents about 3 per cent of the —at least one and one-half times the amount contributed by the members of the Fire Department.

Q. That amount, was that contributed in accordance with the terms of the Local Law? A. Yes.

Q. That check was made up and so deposited? A. Yes, sir. 159

Mr. McAneny: I would like to offer that check in evidence.

Mr. Moore: Let me see the check, please?

(Check handed to Mr. Moore.)

Mr. Moore: No objection.

(Marked Defendants' Exhibit B.)

Q. That check, Defendants' Exhibit B, was drawn against the Westchester Trust Company, was it not? A. Yes.

160 *Stephen A. Roake, for Defendants—Direct.*

Q. Was that drawn against that general fund? A. Yes.

Mr. Moore: I object as irrelevant, incompetent and immaterial. The check is in evidence and speaks for itself.

Mr. McAneny: I think he is entitled to state out of what fund that check was drawn.

The Court: What does the check show? It seems to be drawn on the Westchester Trust Company.

Mr. Moore: The check speaks for itself without his characterizing what fund it came from.

161 Mr. McAneny: If he knows, he can testify.

The Court: The check appears to be drawn on the Firemen's Pension Fund, drawn on the Westchester Trust Company.

I will permit him to answer it. What is your answer?

Mr. Moore: Exception.

Mr. McAneny: You may answer?

The Witness: The question?

Q. Was that check drawn against the general funds of the City? A. It was.

162 Q. When that check was deposited in the First National Bank and Trust Company, what then was the balance of the fund in that bank?

Mr. Moore: Do you know without referring to some record?

The Witness: I cannot memorize figures. I know approximately.

Q. You can refer to your records and testify. A. I have my own memorandum. Our balance on February 28th was $19,938.68.

The Court: That is in the Westchester Title Company?

The Witness: In the First National Bank, Firemen's Pension Fund, after that check drawn on the Westchester Trust Company was deposited.

The Court: The balance was how much?

The Witness: $19,938.68.

Q. Will you examine Defendants' Exhibit A, consisting of certain checks, and can you tell me what those checks were drawn to pay for (handing to witness)? A. Those checks were all drawn to pensioners of the Firemen's Pension Fund with the exception of one, the last check. 164

Q. With the exception of the last check? A. The last check.

Mr. Moore: What check is that, Mr. Roake?

The Witness: Check No. 1948 was drawn to the order of the Firemen's Pension Fund and that constituted our balance at the time deposited in the bank.

The Court: What is the date of that check?

The Witness: May 2, 1933.

Q. What is the amount of that check? A. $5,636.02.

Q. Mr. Roake, are you familiar with the securities that were deposited as a pledge by the First National Bank and Trust Company with the City of Yonkers? A. I am familiar with it, but that was always handled by the deputy comptroller or deputy treasurer at the time. 165

Q. Can you tell us from your knowledge or your records what the amount of that security was in par value as of March 3, 1933?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

The Court: It does not seem that you have laid the ground for that.

166 *Stephen A. Roake, for Defendants—Cross.*

Mr. McAneny: I withdraw the question.

The Court: The question of materiality is another question, but the foundation has not been laid for it.

Mr. McAneny: Cross examine.

Cross examination by Mr. Moore:

Q. Is there anything on this Defendants' Exhibit B, which is a check for $15,570.06, dated February 28, 1933, and drawn on the Westchester Trust Company of Yonkers,
167 New York, which indicates from the check itself on what fund it is drawn? A. No, sir. Can I answer that question? From what fund it is drawn? It is drawn from the City of Yonkers General Fund, but what particular account the check does not signify.

Q. The check does not signify on what particular account it is drawn? A. But it is drawn on the City of Yonkers' General Fund.

Q. How do you know that? A. Because we only have one general fund.

Q. Mr. Roake, did the City of Yonkers have deposits in other banks besides the First National Bank? A. Yes, sir.

168 Q. What other banks in the City of Yonkers did they have deposits in? A. At the time?

Q. Yes. A. The Westchester Trust Company, the Central National Bank, Yonkers National Bank and Trust Company.

Q. Did you have firemen's and policemen's funds, pension funds, in various banks? A. At the time they were all in the First National Bank.

Q. That check of $5,000-and-something, drawn out in May, 1933, where was that deposited? A. It was deposited in the Central National Bank, where the account was opened at the time.

Mr. Moore: That is all.

Re-direct examination by Mr. McAneny:

Q. You spoke of the City having an account in the Central National Bank of Yonkers. Did the City hold securities for its deposits in that bank?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

Mr. McAneny: You have opened it up. You inquired as to the other banks.

The Court: I think it goes further than that.

Mr. McAneny: What is that? 170

Mr. Moore: Yes.

The Court: I do not think the question of its security at the other bank has anything to do with the question here.

Mr. McAneny: The question arises in a great many cases affecting the cases involved in this case as to what the practice of the bank was and the custom. It seems to me it is entirely relevant. Such questions have been framed in the cases that have already been determined by the higher courts, including the United States Supreme Court. They have gone on the question of practice.

The Court: If you are able to show me any such 171 holding, I will be glad to listen to it. The practice is different in different cases. What you are seeking to show is that the fact that deposits were made in other instances has some bearing on the question of this fund being public funds, you mean?

Mr. McAneny: It has bearing on the question as to whether it was the practice in this jurisdiction to permit national banks to pledge securities for public funds.

Mr. Moore: I object to it, your Honor.

The Court: You mean it is distinct from any other district?

172 *Stephen A. Roake, for Defendants—Re-direct.*

Mr. McAneny: Oh, yes, I think it is a question as to the practice in each particular district as to whether or not—in other words, the question of practice of the bank in each particular district has a bearing on the question as to whether or not any particular national bank in that district has the right under the law to pledge its securities for public money.

The Court: I will receive the proof. I do not see that it has any bearing in that respect.

173 Mr. Moore: May I have an exception?

The Court: Yes. I think it should be received.

Q. What is your answer to that?

The Court: I will permit the answer.

Mr. McAneny: Would you mind repeating the question?

Q. (Read by the stenographer.)

The Court: If you know.

A. Yes, sir, the City held securities for deposits in all
174 banks.

Mr. Moore: I move to strike out the answer.

The Court: Yes.

Q. In this particular bank? A. In the Central National Bank the City held securities.

Q. For the full amount of the deposit?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

Mr. McAneny: I withdraw the question.

Q. The Westchester Trust Company is such an institution, is it not? A. I beg your pardon?

Q. The Westchester Trust Company is such a bank? A. I believe it is.

Mr. Moore: Do you know whether it is or not, Mr. Roake?

The Witness: I do not know as I can say I have any authentic knowledge of it.

Q. At any rate, the Westchester Trust Company also pledged securities to the City for its deposits?

Mr. Moore: I object to that as incompetent, ir- 176
relevant and immaterial, your Honor.

Mr. McAneny: The same question affects city banks, with regard to the practice.

The Court: It does not seem to me that it is ipetent.

Mr. Garrity: May I explain that point?

The Court: What do you say?

Mr. McAneny: I do not want to urge any question that you think is not competent, but I think that it has been a question in a great many cases as to what the practice was and I think has considerable control upon the rights of national banks under the 177
National Banking Act to pledge securities. With that in view, I think we are entitled to show what the situation was in our own city with respect to pledges by national banks and state banks of that city. In several cases the United States Supreme Court has gone very fully into the question of the local practice. I have a case here that I would like to have you read.

Mr. Moore: I have the entire section 90 of the United States Annotated, Title 12, and it is provided there that a national bank may be permitted to give securities for deposits where there is a state or local law on that subject permitting said deposits.

178 *Stephen A. Roake, for Defendants—Re-direct.*

Mr. McAneny: That is not a fact. Will you kindly read that law? It does not say anything of the kind.

Mr. Moore: Will you wait a minute?

Mr. McAneny: I do not like to have the record encumbered by a statement that is not a fact. I object to it.

The Court: Let's hear counsel for the plaintiff first.

Mr. Moore: I will read it. The only part of this
179 Section 90 which is relevant—it is quite a long section—is the last paragraph:

"Any association may, upon the deposit with it of public money of a state or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the state."

Mr. Garrity: With reference to the question of the relevancy of the practice in other banks in the State of New York, I refer you to the case of Hallewell *v.* The Town of Hempstead, a case decided by
180 the Federal Court, 10 Fed. Supp. 771. That was a case involving a national bank where the Judge found no local statute and went to the public policy of the State of New York in determining whether or not a national bank could pledge its assets to secure public funds. The record shows that the Judge took evidence as to the custom in the State of New York, both as to cases and customs existing at the present time. Therefore I respectfully submit that we have the right through the witness to show that in the City of Yonkers in other banks the City of Yonkers secured deposits or the banks pledged securities to

secure the public deposit of the City of Yonkers, as part of the general custom of the City. It was also the general custom of the State of New York.

It is our contention that not only is it the custom in the State of New York but by statute it is the determined policy of the State of New York to allow a pledge of the securities of such a bank to secure public money; and by the same token, following up Section 90, a national bank in the State of New York would have a right to pledge its assets to secure public funds.

182

The Court: The question here is whether those are public funds. Isn't that the question?

Mr. Moore: That is one of the questions.

Mr. McAneny: That is one question. If it be a fact that they are public funds, then we are entitled to show what the practice is.

The Court: Assume it was found that they were public funds, what do you claim the status of the plaintiff would be?

Mr. McAneny: Then we maintain that since they are public funds that Section 90 of the National Banking Act permits a national bank to pledge its securities for such deposits, and that in the State of New York the rule is that such pledges are allowable and permissible by state banks.

183

The Court: That is your contention. What is the answer to that argument? If it were found that those were public funds, then what point is involved? What is the point involved with regard to recovery here?

Mr. Romm: If you find that is is a public rather than a private fund, we still maintain that the pledge of the assets by the bank to secure that "public" deposit account was *ultra vires*.

The Court: What is the basis of that?

Mr. Romm: Section 90, which has been spoken of, says in substance that a national bank may pledge assets to secure public funds if the state banks located in the state where the national bank is located are so permitted by the law of the state.

The Court: Are they so permitted under the laws of New York State?

Mr. Romm: We claim it is not so permitted. In urging that claim I rely on the absence of any statute, the absence of any local law or ordinance of the City of Yonkers, and on the two decisions of the highest court of the State of New York, which indicates very clearly that in order to permit or in order to have pledged the bank's assets in New York State to secure public funds, it must be authorized, a statute must be passed specifically authorizing the pledge.

The Court: There is no general statute on it?

Mr. Romm: No, there is none here.

As to the attempt of the City of Yonkers to introduce evidence of a common practice, we claim that any such fact in this case would be incompetent, irrelevant and immaterial for these reasons:

First, Section 90, which is the statute to which we go back in getting an answer to the problem before the Court, says: "Such as is permitted by the law of the state where the national bank is located." I cannot by any stretch of the imagination conceive of the proposition that common practice represents the law.

Secondly, the decision in the case of the State Bank of Commerce *v.* Stone indicates that the statute is necessary in order to give the power.

Third, because the Supreme Court in The City of Marion *v.* Sneeden definitely says that in order to give the power the state must have either a statute or a decision of the highest court of the state. Meaning in effect that the law calls for either a statute or a decision of the highest court.

This case of Hallewell *v.* The Town of Hempstead, read by Mr. Garrity and stated to be of the same general character, there the District Judge did permit the introduction of evidence as to practice. That case was never carried any further. I am informed that it was subsequently settled. That case 188
was decided by the District Judge prior to the important decision which was later decided by the highest court of this state in the City of Mount Vernon *v.* The Mount Vernon Trust Company. The Judge there found that the law of the State of New York permitted the Hempstead National Bank to pledge its assets in order to secure the deposits of The Town of Hempstead because there was a practice, despite the statement by the United States Supreme Court in the Sneeden case that the way to determine that is to look for the state statute or the decision of the highest court of the state. 189

Mr. McAneny: I do not know whether you want to hear further argument on that point. But I can only say that my friend's construction of the testimony in this case is very narrow and not warranted by the case itself. We do not get very far arguing that. In the present case that point becomes a very crucial point in this case as to whether or not they had the right to make the pledge and then pay the money back upon getting the pledge back. That is one of the questions of law involved in the case.

I can only say that not later than December 13th last the United States Supreme Court handed down

a decision covering Section 90 of the National Bank Act, which was very broad in its language and very clear and very convincing, and I believe it brushes aside any ambiguity with regard to the construction of Section 90. The highest court of the State of New York in the very case my friend cites substantiates our theory. If you will just read several paragraphs of that case that I can point out to your Honor, you will see that the Court of Appeals of the State of New York clearly supports our contention in this case by its actual decision in the Mount Vernon case.

The Court: Do you propose to follow this up and show other deposits similarly secured?

Mr. McAneny: I asked these questions because it was opened up by my friend Judge Moore, when he asked whether we had deposits in other banks in the city has left the way open to my showing the nature of the deposits and how they were regarded.

The Court: I doubt whether that would do it so far as the fundamental question of that kind is concerned, on the ground that he had opened up the subject.

Mr. McAneny: I think as a matter of fact and a matter of law I would have a right to ask these questions independently of any opening up of the situation, and I wish to put this in the record to substantiate my point, and also I refer to the court decisions showing the practice in the State of New York.

The Court: I am going to receive it subject to being stricken out later on.

Mr. Moore: Will you make that same ruling with regard to the other questions asked about the Central National Bank?

The Court: Yes. You may answer, Mr. Roake.

Q. The question was, Mr. Roake, whether the accounts covering the city deposits in the Westchester Trust Company were secured by collateral pledge by that company? A. They were.

Mr. Moore: I move to strike out the answer.

The Court: I will deny the motion for the present—reserve decision on the motion.

Mr. Moore: May I have a blanket objection to any other banks or institutions of that kind? That will save me interrupting.

The Court: It seems to be based on the claim that 194
you open up the subject. That includes the two banks, the Central and the Westchester. Very well.

Mr. McAneny: That is all.

Mr. Moore: That is all, Mr. Roake.

(Witness excused.)

GUSTAV W. KLEIN, JR., called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. McAneny: 195

Q. Mr. Klein, are you an official of the City of Yonkers? A. I am.

Q. What position do you hold? A. Deputy Comptroller, Department of Finance, City of Yonkers.

Q. How long have you had that position? Since what time? A. Since January 1, 1934.

Q. Prior to January 1, 1934, what position did you hold? A. I was City Treasurer of the City of Yonkers.

Q. How long did you hold that position? A. From January 1, 1932, to December 31, 1933.

196 *Gustav W. Klein, Jr., for Defendants—Direct.*

Q. Since December 31, 1933 the position of City Treasurer was abolished? A. Yes; due to the consolidation of the Comptroller's office and the Treasurer's office.

Q. It was after that consolidation that you were appointed Deputy Comptroller? A. That is right.

Q. As City Treasurer, what were your duties? A. The duties of City Treasurer are to see that the checks were countersigned in conjunction with the Comptroller, to see that the moneys were properly deposited and also the policy of the department was to see that the securities in the
197 banks——

Mr. Moore: I move to strike out what the policy was of the Treasurer.

Mr. McAneny: Yes. Strike it out.

Q. What were your duties? A. To see that the proper security was at all times in our safe deposit vaults to protect the public moneys deposited in the various banks that the City of Yonkers deposited money in.

Q. You have heard it testified, have you not, that the City of Yonkers held certain securities that had been deposited with it by the First National Bank and Trust Com-
198 pany? You heard that testimony? A. Yes, sir.

Q. As of March 3, 1933, do you have a list of those securities? A. I do.

Q. Could you state the amount of those securities in par value as of that date?

Mr. Moore: I object to it as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Moore: Exception.

The Court: You mean the total?

Mr. McAneny: Yes.

The Witness: Answer the question.

The Court: Yes.

A. The total par value was $535,000.

Q. Were those securities segregated to various accounts or were they held under one control? A. They were held under one control.

Q. In other words, you did not have to apportion and segregate the Firemen's Pension Fund to any other general account, but they were held by the City under the same agreement of deposit? A. They were.

Mr. Romm: We object to the characterization "agreement of deposit." There is no proof in the case of any agreement of deposit here. 200

Mr. McAneny: I withdraw that.

The Court: Yes.

Q. They were really turned over to the City by the bank without any statement as to what particular fund they were allocated to? A. Yes, they were in separate safe deposit boxes, not in one box, but they were there under the control of the City of Yonkers.

Q. They were in separate safe deposit boxes for convenience? A. Yes.

Q. They were not segregated to any fund? A. No, sir; they were not. 201

Q. Have all of those securities been returned to the First National Bank or its representative? A. They have, with the exception of, I think there is—I am not positive of that—either a $1,000 or two $500 bonds that are still being held. I know the amount is $1,000. What the denomination is I am not certain at this time.

The Court: Have you any memorandum made by the First National Bank showing what the receipt he gave the bank was, or a memorandum that is given in connection with the deposits?

The Witness: In reference to the securities?

202 *Gustav W. Klein, Jr., for Defendants—Direct.*

The Court: Yes.

The Witness: Yes, every time the bank would——

The Court: You have such a memorandum?

The Witness: Yes.

Q. What does that record consist of?

Mr. Romm: I object. That is not the best evidence. Let's have the records before the Court.

The Court: That is true.

Mr. McAneny: The Court brought it out.

203 The Court: I brought it out in connection with the prior inquiry. The instrument is the best evidence.

Q. Have you got the records on that? A. Yes, I have.

Q. Will you show them to me? A. (Witness hands to counsel.)

Q. You show me certain papers, Mr. Klein. By whom were those papers delivered to you? A. These are receipts signed by Mr. Trudeau, who was Conservator of the First National Bank, giving back securities that we had in our safe deposit boxes.

204 Mr. Romm: Will you read the question?

(Question read by stenographer.)

Mr. Romm: I move to strike out the answer as not being responsive.

The Court: I was referring in my inquiry to the original deposits when originally there was some receipt given by the City to the bank or some memorandum showing the deposits made by the bank as security for those payments. In fact, it was made to pay back the City.

Mr. McAneny: I will get to that.

The Court: All right. This point is not in the suit, this question about the receipt. The receipt was given by the Conservator.

Mr. Moore: We received the securities back.

The Court: The receipt was given by the Conservator to the City.

Q. Mr. Klein, you say that these receipts were handed to you by the Conservator, Mr. Trudeau? A. Yes, after we had delivered and turned back to him the bonds for that amount. He gave us a receipt in every instance. 206

Mr. Romm: I move to strike out any portion of the answer that is not responsive.

The Court: The question was whether this receipt was given to you by Mr. Trudeau.

Mr. Romm: The answer on that is yes or no.

The Witness: Yes, your Honor, delivered to me by Mr. Trudeau.

Mr. McAneny: I offer them in evidence. Will you just read them (handing to Mr. Moore)?

Mr. Moore: I object to this as incompetent, irrelevant and immaterial. We have received the bonds. 207

The Court: I will receive it. $535,000; is that the amount?

Mr. Moore: I haven't figured up the amount. I assume that is correct.

The Court: $534,000.

(Marked Defendants' Exhibit C.)

Q. Mr. Klein, will you just read those receipts?

The Court: Is there any question about this, Mr. McAneny? They all seem to agree, except the $1000.

208 *Gustav W. Klein, Jr., for Defendants—Cross.*

There is $534,000. There is no question about this. What is the necessity of reading that?

Mr. McAneny: The securities were turned over and these receipts were delivered to him, and the language of the receipt is to my mind of some importance.

The Court: They are received in evidence.

Mr. McAneny: Yes. I think I would like to have it done inasmuch as we have no jury.

The Court: I do not think it is necessary to read all the items of that receipt. There can be no question about the particular bonds.

209

Q. If you will just read the substance of the receipt into the record? A. The bottom paragraph states: "Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers. (Signed) Percival W. Trudeau, Conservator, First National Bank and Trust Company, Yonkers, New York." This one is dated March 28, 1933.

Q. They are all similar? A. Yes, sir.

210 Mr. McAneny: That is all.

Cross examination by Mr. Moore:

Q. How long were you Treasurer of the City of Yonkers? A. From January 1, 1932 to December 31, 1933.

Q. Have you in your files or anywhere any pledge agreement made by the officials or directors of the First National Bank and Trust Company of Yonkers relative to the deposit of the City of Yonkers? A. Not that I know of.

Q. Was there any written pledge agreement made between the City of Yonkers and the directors or officers of the First National Bank and Trust Company of Yonkers?

Mr. McAneny: I object to that unless it is within the knowledge of the witness.

The Court: I presume that it is.

Q. (Continuing). Within your knowledge, during the time that you were City Treasurer, was any such pledge agreement ever entered into? A. Not that I know of.

Q. May I see that last exhibit? A. (Witness hands to Counsel.)

Mr. Moore: That is all.

212

Re-direct examination by Mr. McAneny:

Q. When you first became City Treasurer, did you say it was January 1, 1932? A. That is right.

Q. Since that time do you know of your own knowledge that the banks that you have testified to all gave securities to the City for their deposits?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

Mr. McAneny: I am asking him for the duration of the time that was within his knowledge.

Mr. Moore: I am objecting to it, your Honor. It has no useful purpose as far as I can see in this case. I object to it as incompetent, irrelevant and immaterial, the same objection as the other one that was raised. 213

The Court: I will receive it with the reservation I made before. You may answer.

A. Yes, all the banks that the City deposited money with were secured by the securities of the banks.

Mr. Moore: I move to strike the answer out.

The Court: Motion denied.

Mr. Moore: Exception. That is all, Mr. Klein.

(Witness excused.)

14 *Gustav W. Klein, Jr., Recalled—Direct.*

GUSTAV W. KLEIN, JR., recalled, further testified as follows:

Direct examination by Mr. McAneny:

Mr. McAneny: I would like to include the resolution of the Board of Estimate and Apportionment and the sections of the law that were referred to, Section 69 and Section 70 of the Second Class Cities Law and the testimony to the effect that Mr. Roake was a member of the City Department and then in addition 15 that he qualified in that case, along the same lines. I would like to offer in evidence in this case the claim upon the check which has been offered in evidence here was paid, and I would like the witness to identify it.

Mr. Moore: I object to all this upon the same ground that I objected to it in the Police Pension Fund case, on the ground it is incompetent, irrelevant and immaterial.

The Court: I understand you do not object to the reopening of the case for the purpose of offering this testimony?

16 Mr. Moore: No, I have no objection to that.

The Court: Subject to your right to raise the objection which you have raised in this Police Pension case to the similar testimony, notwithstanding the fact that it is received, the objection is overruled and an exception noted.

(Resolution marked Defendants' Exhibit C-1).

Mr. McAneny: I would now like to read into the record a section of the Second Class Cities Law, Sections 69 and 70 of the Second Class Cities Law, which is a law covering the City of Yonkers.

Mr. Garrity: Second Class Cities Law of 1909, Chapter 55, as Amended:

(Omitted for brevity.)

Mr. Moore: I move to strike out the two sections that have just been read as incompetent, irrelevant and immaterial.

The Court: Are you offering the copy of these acts themselves?

Mr. McAneny: The laws themselves. I am sure that the Court takes judicial notice of the State laws. 218

The Court: If that were true, a motion to strike out is not necessary.

Mr. Romm: They read it into evidence, that is why the motion is made.

The Court: Motion denied.

Mr. Moore: Exception.

Mr. McAneny: I ask counsel for the plaintiff to concede that the Yonkers Trust Company and the First National Bank and Trust Company subsequent to this resolution were consolidated and merged.

The Court: What is the date of that?

Mr. McAneny: And the consolidation agreement filed in the office of the Register of Westchester County. Date of merger is September 30, 1929. Do you concede that? 219

Mr. Moore: There was another bank, the Bryn Mawr-Nepperhan. Those three were consolidated and became known as the First National Bank and Trust Company of Yonkers on September 30, 1929.

Mr. McAneny: The consolidated bank, you will concede, assumed all the obligation of the constituent banks.

Mr. Moore: I cannot concede that. I do not know.

220 *Stephen A. Roake, Recalled—Direct.*

Q. Subsequent to that consolidation, Mr. Klein, did you continue to carry accounts of the City in the First National Bank and Trust Company? A. I did.

Mr. McAneny: I will just ask to have this warrant and claim identified by Mr. Klein, if I can.

Q. Can you tell us what this covers? A. Warrant drawn on the City Treasurer for the payment of the Firemen's Pension Fund for the year ending December 31, 1932, members contribution $10,380.04——

221 Mr. McAneny: You do not need to read it. It is the same wording as the other.

The Court: I think that is in the proof already, as far as the amount is concerned and the amount paid.

Mr. McAneny: I will offer that in evidence in this case.

The Court: Mark it.

(Marked Defendants' Exhibit D.)

Mr. McAneny: That is all.

(Witness excused.)

222

Stephen A. Roake, recalled, further testified as follows:

Direct examination by Mr. McAneny:

Q. I believe you have testified, Mr. Roake, that you had charge of the accounts of the Firemen's Pension Fund; is that so? A. Yes, sir.

Q. Under the law, the Local Law, which has been put in evidence, it was incumbent upon the City, was it not, to deposit into that fund certain moneys to cover deficits? A. Yes, sir.

Mr. Romm: I object upon the ground that it is a conclusion of law.

The Court: Sustained.

Mr. Romm: It speaks for itself.

Mr. McAneny: I am just leading up to the question.

The Court: Objection sustained.

Q. The City of Yonkers—did the City of Yonkers make certain payments into that fund? A. Yes, sir.

Q. From year to year? A. They did. 224

Q. What did those payments cover? A. The payments were one and one-half times the contribution of the employees to the deficit at the end of each year.

Q. As prescribed by the local laws? A. Yes.

Q. Can you tell me what those payments were for the years from 1931 on? A. The deficits?

Q. Yes.

Mr. Moore: I object to this as incompetent, irrelevant and immaterial, your Honor.

The Court: No, I think it may have some bearing on the question. You are speaking now of the amount of deficit after the payment of 1½ per cent? 225

The Witness: Yes.

The Court: All right. By years, Mr. McAneny?

Mr. McAneny: By years, yes.

A. Deficit on December 31, 1931 was $3,429.53.

Mr. Romm: December 31, 1931?

The Witness: That is right.

A. (Continuing) December 31, 1932, the deficit was $6,790.66; $27,591.75 for 1933.

Q. What year was that? A. 1933.

Mr. Romm: What date in that year?

The Witness: December 31st.

Mr. Moore: I object. That fact was taken up by the payment, your Honor.

The Court: How is it material then, Mr. McAneny?

Mr. Moore: I move to strike out the answer, the last part of the answer, so far as it refers to the deficit in 1933.

Mr. McAneny: I am entitled to show what the City actually paid into this fund. We are now trying the case here to determine the character of this fund.

The Court: In so far as these deposits were a part of the fund in question I am receiving it. Beyond that I won't do it.

Mr. Moore: This last payment was not in our bank at all. It had nothing to do with the fund, so far as our bank was concerned.

The Court: How did that happen? Paid some other bank?

Mr. Moore: Paid into some other bank. Our bank closed on the 3rd of March, 1933 and they had received all their money from our bank by the 16th day of December, 1933. Now he has testified as to the deficit on December 31, 1933, which was two weeks after we paid them out. We paid them and closed up. What the deficit was in 1933——

The Court: I do not see that it is relevant here.

Mr. McAneny: I think it is important that you know the character of this fund. The First National Bank and Trust Company carried this as the City of Yonkers Firemen's Pension Fund. They were fully aware of the law. They could see the actual facts, how that fund has been handled by the officials of the City. It seems to me that has a bearing on the characterization of the fund.

The Court: I do not think so. I will sustain the objection.

Mr. McAneny: I take an exception.

The Court: Anything further?

Mr. McAneny: That is all.

Cross examination by Mr. Moore:

Q. Mr. Roake, was this fund paid by the City with donations to the fund of the Firemen's Pension Fund?

Mr. McAneny: I object to that question. I do not think it is quite clear. Would you mind repeating it? 230

The Court: He wants to know where this money came from that the City deposited in that fund.

Mr. McAneny: I think he has testified they were deposited pursuant to law.

Mr. Moore: No.

Q. Were they deposited pursuant to law? A. Yes, sir.

Q. And the law required that a donation equal to one and one-half times the amount paid in by the firemen be added to the fund every year?

Mr. McAneny: I object to the word "donation." There is nothing in the law about donation. It is not a donation. 231

Q. Was one and one-half times the deficit deposited in the Firemen's Fund each year? A. Yes, sir.

Q. By the City? A. Yes, sir.

Q. Pursuant to law? A. Yes, sir.

Q. You are the only one that has charge of that fund in your office? A. I have full charge of the cash end of it. There are bookkeepers, of course, taking care of their records.

232 *Stephen A. Roake, Recalled—Cross.*

Q. Who holds the fund as trustee?

Mr. McAneny: I object to that.

Q. Who has charge of the fund? Who holds the fund?

Mr. McAneny: I object to that as calling for a conclusion.

Mr. Moore: He knows all about it. He had charge of it. He may be able to tell us who had supervision over this fund.

233 Mr. McAneny: I object to that. He is not qualified. He has testified as to who acts as treasurer. That is all.

Q. Have you testified that you are in charge of the Firemen's Pension Fund for the Comptroller of the City of Yonkers? A. I received all the cash and supervised disbursements upon the authorization of the Comptroller or Trustees.

Q. Do you know who the Trustees are of the fund? A. The Commissioner of Public Safety, the Mayor and Comptroller.

Q. This fund was made up according to the schedules
234 of law that were read here this morning and introduced in evidence? A. Yes, sir.

Mr. Moore: Contributions, shall I say, Mr. McAneny, by the City of Yonkers? Do you object to the word "donation"?

Mr. McAneny: I object to any characterization of this fund except that they were deposited according to law, as he has testified to.

The Court: He may answer this question: You said you had charge of the funds. The funds were paid directly to the bank, were they, and then they are checked out?

The Witness: Fees are in some cases paid to me in cash. I am bonded and I have full charge of the accounts, so far as the cash is concerned.

The Court: What payment would be made to you?

The Witness: Mortgage interest, and so on.

The Court: What was the nature of the payments that would be made?

The Witness: Mortgage interest on investments.

The Court: How did the firemen make payment to the association, directly?

The Witness: Their deductions are made from 236
the payroll and it is turned over to me and I deposit it in that particular fund.

Q. That fund is made up practically by deductions from the payroll of the firemen each month? A. Yes.

Q. By fines and the other various ways stated in the law that was read here this morning? A. Yes, sir.

Q. In addition to the 1½ per cent of the amount paid in by the firemen for the preceding year you would make up any deficit?

Mr. McAneny: Paid in by the firemen, did you say? 237

Mr. Moore: Paid in by the firemen.

Mr. McAneny: That is not a fact; paid in by the City.

Mr. Moore: The City pays one and one-half times as much as the firemen.

Mr. McAneny: Will you read that question?

(Question read by the stenographer.)

The Court: I think it all appears in the record.

Q. May I ask you just one or two questions? Once this money got into the pension fund of the firemen was it ever transferred back to the City? A. No, sir.

238 *Stephen A. Roake, Recalled—Re-direct.*

Mr. McAneny: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Moore: He has answered "No, sir." That is all.

Mr. McAneny: I ask to have the items corresponding to the items in Defendants' Exhibits F, G and H in the Police Pension Fund inserted in this record, as testified to by this witness, Mr. Roake, and I will ask him if he will read from the budgets of
239 1931, 1932 and 1933 the entries covering the Firemen's Pension Fund.

Re-direct examination by Mr. McAneny:

Q. Just give it for the year 1931. A. 1931 estimated contribution to Firemen's Pension Fund, $16,269.85.

The Court: What page is that?

The Witness: Page 58.

The Court: All right.

Mr. Moore: How did it read, Mr. Roake?

The Witness: Contribution to Firemen's Pension Fund.

240 Mr. Moore: I see.

A. (Continuing) 1932 estimate, page 2, contributions to Fire Pension Fund, $15,815.48.

Mr. Moore: Is that Fire Pension Fund or Firemen's?

The Witness: It should be Firemen's, but it says "Fire" here.

A. (Continuing) 1933 estimate, page 3, contributions to Fire Pension Fund, $16,032.29.

Mr. McAneny: That is all.

Re-cross examination by Mr. Moore:

Q. Mr. Roake, those were contributions made by the City to these funds, were they? A. Those were estimates of contributions to be made.

Q. Do the estimates and the actual amounts contributed there coincide? A. Very closely.

Q. Or agree as to amount? A. Very closely.

Q. That money once having been turned into either of those funds was never returned to the City, was it?

Mr. McAneny: Are you asking as a matter of fact or matter of law? 24

Mr. Moore: I am asking him whether he knows about it as a matter of fact. He has been there since 1922.

Mr. McAneny: You asked him if any money had been returned to the City by these funds or whether it should be returned by the City.

Q. I am asking you if when this money got into the Police or Firemen's Fund it became a part of that fund? A. It does.

Mr. McAneny: That is calling for a conclusion of the witness and is a matter of law. 24

The Court: I think that fact appears.

Mr. Moore: I do not think I will ask him any more. That is all.

Mr. McAneny: I ask that that question and answer be stricken out.

Mr. Moore: No, I think it should stand.

The Court: It may call for a conclusion if it does appear that these funds were deposited as contributions and deposited in a special fund. I think that is sufficient for the purpose.

244 *Motion to Dismiss the Complaint.*

Mr. McAneny: That is true.

The Court: I will strike it out; the motion is granted to strike out.

Mr. Moore: Exception.

Mr. McAneny: It is a question of law.

The Court: I understand that.

Mr. McAneny: That is all.

By Mr. Moore:

Q. Were those payments paid in the other years for the
245 year 1933? You have given us two checks and those were similar payments made in the two previous years 1932 and 1931. A. Yes, sir.

Q. They were? A. Yes, sir.

Mr. McAneny: That is all. The defendant rests, your Honor.

Mr. Moore: The plaintiff rests, your Honor.

Mr. McAneny: I renew my motion to dismiss the complaint upon the grounds already stated, which are to the effect that so far as moneys that were paid out on these checks are concerned, there is no evidence of any insolvency of the bank.

246

Furthermore, that the moneys were public moneys within the intention and within the wording of Section 90 of the National Banking Law and that they were legally secured, and that any payment out of this account was secured in any manner and particularly in the manner covered by the testimony in this case showing a legal and valid transaction binding upon the bank, the Conservators and Receivers.

On the further ground that there has been no demand made against anyone for the return of any of this money and there has been no service of any claim upon the officers

of the City, as required by the laws of the State of New York.

It seems to me that viewing the whole circumstances in this case it would be iniquitous to claim or hold that these trustees who have acted within the law and who have received these moneys and deposited them in the national bank and being fully secured as to all their deposits, having no profit whatever in this situation, acting merely as trustees and having in good faith drawn these checks and these checks having all been paid out by the bank without question, that now six years later we should be haled into court 248
and told that these trustees are personally liable and must refund these moneys; it seems to me that the whole course of conduct of the trustees and the bank and the representatives of the bank would make such an act very inequitable. So far as I can see, it is absolutely legal.

The cases hold that the State of New York, and it is the practice of the state banks and other institutions or depositories to give securities for public money, and I believe that the interpretation of Section 90 by the United States Supreme Court in the case just mentioned, McNair, Receiver, *v.* W. D. Knott, Treasurer, decided December 13, 1937 and not yet made public and published in the law 249
books, covers this whole situation very clearly.

In that case the Supreme Court determined that in a case where there might be any question of competition for the deposit of public moneys between national banks and state banks, that the national banks could cover the course of procedure and take the same steps that state banks might take or that might affect state banks.

In the case cited of the City of Mount Vernon *v.* The Mount Vernon Trust Company, decided by the Court of Appeals of this state, I think a careful examination of that opinion would show that the Court said that the City of Mount Vernon having received such securities for its

municipal deposits of about $1,000,000 from the Mount Vernon Trust Company, that they might not be entitled to hold and hypothecate those securities and they could not secure them back without repaying to the City the amount of the deposit.

It is the same situation that might be urged in this case. In other words, the City had the securities and the bank paid through the medium of these checks, I think no payments were ever made directly to the City, through the medium of these checks to those persons who presented
251 the checks and received their money, the bank paying up to the amount of the City's deposits and received back its collateral, and it is apparent from this record that there were particular City funds or City deposits which were covered by the same collateral. But it is apparent that the same procedure went through without question and the bank paid these checks and got their collateral back, and that is what the Court of Appeals says they would have to do in this State. I believe that the United States decisions from its Supreme Court and the one I last cited would bear out the fact that under such conditions the First National Bank and Trust Company had that power to make this deposit of securities and were within their legal
252 rights in getting them back and paying the City the amount of the City deposits. I think it is shown in this case that there was $535,000 worth of par value of securities held by the bank and they were returned to the City on the payment to the City of a far lesser amount than those securities represented.

In other words, it was an excellent thing for the bank itself to get back those pledged securities and to pay a much lesser sum than represented the City's account. All of this indicates that the bank acted voluntarily. No question about that. The transaction was consummated and here six years after this suit is brought.

As I say, it becomes a question of fact as to whether or not those were public funds or of such a nature as to be considered as public funds and, secondly, as to whether there was any undue payment received by reason of insolvency or by reason of any other claim as to why these moneys should be refunded. In that case of McNair *v.* Knott, Judge McReynolds in determining the case with a concurring opinion written by Mr. Justice Black, in his concurring opinion Judge McReynolds viewed the case like this where there had been this relationship between the parties and the matters had been consummated and 254
gone through with, he said that it seemed to him that there was nothing to decide the case on without going into the question of power under Section 90.

I ask your Honor if you will read that case. Your Honor is inclined to reserve decision on this motion until we can submit those authorities. Perhaps it might help us if your Honor could give us that opportunity.

Mr. Moore: There was a question raised about the giving of notice this morning. You will notice that this action is not brought against the City of Yonkers. It is brought against the Trustees of the Firemen's Pension Fund of the City of Yonkers. There is no notice required, 255
requiring us to give the City of Yonkers notice. No notice, I think, was given. I am not familiar with McNair *v.* Knott. I understand it is a recent case. The facts of it have never been brought to my attention. Mr. McAneny says it is not reported.

Mr. McAneny: It is reported, but not published in the printed volume.

The Court: The New York Court of Appeals?

Mr. McAneny: No, the Supreme Court.

The Court: Yes, the Supreme Court.

Mr. Moore: I thought that we were going to submit briefs in this case, your Honor.

256 *Motion to Dismiss the Complaint.*

The Court: That is the way to do it, of course.

Mr. Moore: How long a time will you want?

The Court: What about the other suits?

Mr. Moore: I am prepared to go ahead with the next case.

The Court: We will determine that question later. I will reserve decision on this motion. We will see how far we can get, to save all the time we can.

Mr. Moore: May we have a ten-minute adjournment so as to get the papers in the next case ready?

257 The Court: Yes.

Mr. McAneny: I ask the Court to make a finding in favor of the defendants.

The Court: I will withhold any action on this motion at this time.

Suppose you submit briefs on February 7th. You may send them to me at Buffalo at the Federal Courthouse.

Mr. McAneny: I assume that we will file separate briefs without the exchange of briefs and reply briefs.

Mr. Moore: Yes.

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259

Plaintiff's Exhibit 1.

TREASURY DEPARTMENT

No. 653

Office of the Comptroller of the Currency

Washington, D. C., November 15, 1937.

WHEREAS, Arthur E. Muth was duly appointed and commissioned Receiver of "The First National Bank & Trust Company of Yonkers," located in the City of Yonkers, County of Westchester and State of New York on the twenty-third day of January, 1934, and whereas the said Arthur E. Muth has resigned to take effect at the close of business on November 15, 1937.

260

NOW, THEREFORE, I, William Prentiss, Jr., Acting Comptroller of the Currency, do hereby appoint Walter F. Downey Receiver of "The First National Bank & Trust Company of Yonkers" to take effect at the close of business on the fifteenth day of November, 1937, in place of the said Arthur E. Muth, with all the powers, duties, and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver.

261

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this fifteenth day of November, A. D., 1937.

WILLIAM PRENTISS, JR.,
Acting Comptroller of the Currency.

(Seal)

(Duly certified November 16, 1937.)

262

Plaintiff's Exhibit 2.

PROCLAMATION

(SEAL OF STATE)

STATE OF NEW YORK

Executive Chamber

Until early this morning it was my hope that it would not be necessary to interrupt the continuous operation of the banking system of New York State. The spread of
263 hysteria and the restrictions imposed upon the banking facilities of the country through measures adopted in so many states have at last placed upon the New York banks a burden so great that it has finally rendered drastic action imperative here.

Therefore, at a meeting early this morning the Clearing House Committee of the New York Clearing House, with the advice and recommendation of the Federal Reserve Bank of New York, has asked me to proclaim a banking holiday lasting until the close of business, Monday, March 6th.

I make this proclamation with complete conviction that
264 the best interests of the people of the State are being served thereby. This is a time for coolness and leadership. The people of this State and of the whole nation have shown a splendid spirit to date in meeting all the trying problems of the depression. I am confident that this spirit will be maintained.

The interval which this holiday affords should give responsible officials the necessary opportunity to consider the situation calmly and to prepare the way for an adjustment of our difficulties.

NOW, THEREFORE, I, Herbert H. Lehman, Governor of the State of New York, do hereby proclaim and set apart

Saturday, March 4th, and Monday, March 6th, as holidays on which all banking institutions will be closed.

GIVEN under my hand and the Privy Seal of the State at my residence, 820 Park Avenue, in the City of New York, this fourth day of March in the year of our Lord One Thousand nine hundred and thirty-three.

(SEAL)

HERBERT H. LEHMAN

BY THE GOVERNOR: 266

JOSEPH J. CANAVAN
Secretary to the Governor

State of New York
Department of State
Filed Mar 4—1933

EDWARD J. FLYNN
Secretary of State.

267

268

Plaintiff's Exhibit 3.

PROCLAMATION

(SEAL OF STATE)

STATE OF NEW YORK

Executive Chamber

WHEREAS, a proclamation has been issued by the President of the United States declaring a bank holiday to and including March ninth, one thousand nine hundred thirty-

269 three;

NOW, THEREFORE, I, Herbert H. Lehman, Governor of the State of New York, do hereby declare that the bank holiday heretofore declared by me in the State of New York is extended to and including said March ninth, one thousand nine hundred thirty-three.

(SEAL)

GIVEN under my hand at 820 Park Avenue in the City of New York and under the Privy Seal of the State at the Capitol in the City of Albany this sixth day of March in the year of our Lord one thousand nine hundred thirty-three.

270

HERBERT H. LEHMAN

BY THE GOVERNOR:

JOSEPH J. CANAVAN
Secretary to the Governor.

State of New York
Department of State
Filed Mar 11—1933

EDWARD J. FLYNN
Secretary of State

Plaintiff's Exhibit 4.

FIRST NATIONAL BANK AND TRUST COMPANY

YONKERS, N. Y.

Name Firemen's Pension Fund City of Yonkers

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
		Balance Brought Forward						
16,738.96	Mar 3 '33	50.00—	50.00—	48.21—			Mar 3 '33	16,590.75*—
16,590.75	Mar 18 '33	50.00—					Mar 18 '33	16,540.75*—
16,540.75	Mar 20 '31	50.00—					Mar 18 '33	16,490.75*—
16,490.75		50.00—					Mar 20 '33	16,440.75*—
16,440.75	Mar 28 '31	37.50—					Mar 28 '33	16,403.25*—
16,403.25	Mar 31 '33	125.00—	95.83—				Mar 31 '33	16,182.42*—
16,182.42	Apr 1 '33	104.17—	93.75—	50.00—				
	Apr 1 '33	166.67—	166.67—	50.00—				
	Apr 1 '33	125.00—	50.00—	50.00—				
	Apr 1 '33	50.00—	50.00—	116.67—				
	Apr 1 '33	104.17—	50.00—	141.67—				
	Apr 1 '33	83.87—	50.00—	50.00—				
	Apr 1 '33	50.00—	50.00—	166.67—				
	Apr 1 '33	166.67—	50.00—	125.00—				
	Apr 1 '33	95.83—	102.08—				Apr 1 '33	13,823.53*—
	Apr 3 '33	125.00—	50.00—	50.00—				
	Jan 3 '33	102.08—	50.00—	50.00—				
13,823.53	Jan 3 '33	50.00—	93.75—	50.00—				
	Jan 3 '33	116.67—	50.00—	87.50—				
	Jan 3 '33	166.67—	50.00—	50.00—				
26,505.39	Apr 3 '33	50.00—	270.83—					
	Apr 3 '33	50.00—	125.00—	50.00—				
	Apr 3 '33	187.50—	50.00—					
11,898.53							Apr 3 '33	11,898.53*—
11,898.53	Apr 4 '33	50.00—	166.67—	87.50—			Apr 4 '33	11,594.36*—
11,594.36	Apr 5 '33	50.00—	93.75—	50.00—				
	Apr 5 '33	50.00—	50.00—	50.00—			Apr 5 '33	11,250.61*
11,250.61	Apr 6 '33	50.00—	50.00—	50.00—			Apr 6 '33	11,100.61*—
11,100.61	Apr 7 '33	102.08—	95.83—				Apr 7 '33	10,902.70*
10,902.70	Apr 10 '33	102.08—					Apr 10 '33	10,800.62*
10,800.62	Apr 13 '33	95.83—					Apr 13 '33	10,704.79*
10,704.79	Apr 29 '33	104.17—					Apr 29 '33	10,600.62*—
10,600.62	May 1 '33	87.50—	50.00—	50.00—				
	May 1 '33	50.00—	50.00—	125.00—				
	May 1 '33	116.67—	50.00—	50.00—				
	May 1 '33	50.00—	125.00—	166.67—				
	May 1 '33	270.83—	104.17—	116.67—				
	May 1 '33	50.00—	166.67—	50.00—				
	May 1 '33	125.00—	141.67—	50.00—				
	May 1 '33	50.00—	102.08—	50.00—				
	May 1 '33	93.75—					May 1 '33	8,258.94*—
8,258.94	May 2 '33	50.00—	50.00—	87.50—				
	May 2 '33	187.50—	50.00—	166.67—				
	May 2 '33	166.67—	50.00—	50.00—				
	May 2 '33	50.00—	93.75—				May 2 '33	7,256.85*—
7,256.85	May 3 '33	5,636.02—	166.67—	50.00—				
	May 3 '33	50.00—	166.67—	50.00—				
	May 3 '33	50.00—	50.00—				May 3 '33	1,037.49*—
1,037.49	May 4 '33	125.00—	102.08—	95.83—				
	May 4 '33	93.75—	125.00—	50.00—				
	May 4 '33	50.00—	50.00—				May 4 '33	345.83*—
345.83	May 6 '33	50.00—	50.00—	95.83—			May 6 '33	150.00*—
150.00	May 8 '33	50.00—					May 8 '33	100.00*—
100.00	May 9 '33	50.00—					May 9 '33	50.00*—
50.00	Oct 26 '33	50.00—					Oct 26 '33	.00*—

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Plaintiff's Exhibit 5.

List of Bonds Surrendered

Description of Assets Pledged	Face Value
State of Arkansas, 4½s, due 1942	$ 50,000.00
Butte, Montana, 6s, due 1941	15,000.00
Charlotte, North Carolina, 4½s, due 1934	5,000.00
Galveston, Texas, 5s, due 1933-1935	12,000.00
Town of Greenburgh, New York, 4½s, due 1946	15,000.00
Town of Greenburgh, New York, 4½s, due 1953	5,000.00
275 Town of Greenburgh, New York, 4½s, due 1954	1,000.00
Town of Huntington, Long Island, 4½s, due 1938	2,000.00
Town of Huntington, Long Island, 4½s, due 1945	2,000.00
Town of Huntington, Long Island, 4½s, due 1946	7,000.00
County of Jefferson, Alabama, 5s, due 1947	15,000.00
State of Louisiana, 4¾s, 1973	10,000.00
State of Louisiana, 4½s, due 1953	5,000.00
New Orleans, 4½s, due 1956	5,000.00
276 City of New York, 4½s, due 1965	10,000.00
Norfolk, Virginia, 4½s, due 1935	10,000.00
Norfolk, Virginia, 4½s, due 1935	15,000.00
State of Oregon, 5½s, due 1937	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1946	2,500.00
City of Orlando, Florida, 5½s, due 1952	25,000.00
Portsmouth, Virginia, 5s, due 1954	10,000.00

Plaintiff's Exhibit 5.

Description of Assets Pledged	Face Value
City and County of San Francisco, 5s, due 1945	$ 10,000.00
Village of Sea Cliff, New York, 5s, due 1933	1,000.00
State of South Dakota, 5s, due 1938	15,000.00
Winston-Salem, North Carolina, 4¾s, due 1936	14,000.00
Canadian, Int. Paper, 6s, due 1949	25,000.00
Comm. of Kentucky, 4½s, due 1950	50,000.00
Town of Lyndhurst, 5½s, due 1934	55,000.00
State of New Mexico, 6s, due 1935	25,000.00
Bay City, 4s, due 1935	3,000.00
Seattle, Washington, 5s, due 1934	6,000.00
Seattle, Washington, 5s, due 1940	2,000.00
Teaneck, New Jersey, 4½s, due 1934	25,000.00
Union, 6s, due 1934	25,000.00
Ohio Public Service, 6s, due 1953	30,000.00
South Bay Cons. Water Co., 5s, due 1950	10,000.00
Laclede Gas Light Co., 5½, due 1935	5,000.00
Total Face Value	$535,000.00

Defendants' Exhibit A.

(Not printed.)

280

Defendants' Exhibit B.

(Front)

CITY OF YONKERS, N. Y.

Warrant No. 170736 No. 64269

Yonkers, N. Y. Feb. 28, 1933

50-53 WESTCHESTER TRUST COMPANY

Pay to the
order of FIREMEN'S PENSION FUND—YONKERS.....$15,570.06
City of Yonkers $15570 and 06 Cts.....Dollars

This check is payable through any member of the New York Clearing House without charge for exchange.

281 for F. P. Fund

Countersigned by

JAS. E. HUSHION
Comptroller

G. W. KLEIN JR.
Treasurer

CITY TREASURER'S OFFICE

(Back)

[Perforation]

PAID
3 1 33

282

[Stamps]

Pay to the Order of
Any Bank, Banker or Trust Co.
Previous Endorsements Guaranteed

[FEB 28 33]

THE FIRST NATIONAL BANK & TRUST CO.
50-51 Yonkers, N. Y. 50-51
William J. Bright, Cashier.

Pay to the Order of
FIRST NATIONAL BANK
Account of
Firemen's Pension Fund
City of Yonkers

Defendants' Exhibit C.

March 28, 1933

Received from the Treasurer of the City of Yonkers the following bonds:

15,000.	County of Jefferson 5s, 1947	11,250.
10,000.	State of Louisiana 4¾s—1973	7,500.
5,000.	" " 4½s—1953	4,000.
25,000.	City of Orlando, Fla. 5½s—1952	12,000.
25,000.	Canadian International Paper 6s—1949	5,250.
25,000.	Teaneck, N. J. 5½s—1934	17,500.
30,000.	Ohio Public Service 1953	24,000.
10,000.	South Bay Consolidated Water Co. 5s —1950	6,000.
5,000.	Laclede Gas Light Co. 5½s—35	2,400.
5,000.	New Orleans 4½s—1956	4,250.
15,000.	Butte, Montana 6s—41	11,250.
10,000.	Portsmouth, Va. 5s—54	7,700.
7,000.	Town of Huntington, L. I. 4½s—1946	5,915.
10,000.	Norfolk, Va. 4½s—1935	9,400.
197,000.		128,415.

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator

FIRST NATIONAL BANK & TRUST CO.,
Yonkers, N. Y.

286 *Defendants' Exhibit C.*

April 3rd, 1933

Received from the Treasurer of the City of Yonkers the following Bonds:

$50,000.	State of Arkansas	4½	1942	37	$ 18,500.
55,000.	Town of Lyndhurst	5½		60	33,000.
50,000.	Commonwealth of Kentucky	4½		80	40,000.
14,000.	Winston-Salem, N. C.	4¾		90	12,600.
15,000.	State of South Dakota	5		89½	13,425.
3,000.	Bay City	4		80	2,400.
287 5,000.	Town of Greenburgh	4½	1953	81.5	4,075.
1,000.	" " "	4½	1954	18¼	812.50
					$124,812.50

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator

FIRST NATIONAL BANK & TRUST CO.,
288 Yonkers, N. Y.

Defendants' Exhibit C. 289

April 7, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

$15,000.	Norfolk, Va. 4½s—1935	@	94	14,100.
25,000.	Union, N. J. 6s—1934	@	80	20,000.
40,000.				34,100.

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects 290
without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

291

292 *Defendants' Exhibit C.*

May 4, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

5,000. City of Charlotte, N. C. 4½s due 1934
12,000. Galveston, Texas 5s—1933-5
15,000. Town of Greenburgh, N. Y. 4½s—1946
2,000. Town of Huntington, L. I. 4½s—1938
2,000. " " " 4½s—1945
10,000. City of New York 4½s— 1965
293 2,500. State of Oregon 5½s—1938
2,500. " " 5½s—1945
2,500. " " 5½s—1945
2,500. " " 5½s—1946
1,000. Village of Sea Cliff, N. Y. 5s—1933
25,000. State of New Mexico 6s—1935
6,000. Seattle, Wash., 5s—1934
2,000. " " 5s—1940

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

294 PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

Defendants' Exhibit C. 295

May 16, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

$10,000. City & County of San Francisco, school bonds 5s of 1945

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers,

PERCIVAL TRUDEAU

296

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

Yonkers, N. Y., July 20, 1933

RECEIVED, from the Treasurer of the City of Yonkers the following bonds:

$2,000 Oregon State Highway 5½% bonds due Oct. 1, 1937; Nos. 5034 and 5035 $1,000 each

1,000 Oregon State Highway 5½% bonds due Oct. 1, 1938; 297
No. 5110 and

1,000 Oregon State Highway 5½% Bonds due April 1938; No. 5072

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

298

Defendants' Exhibit C-1.

Resolution of Board of Estimate and Apportionment of The City of Yonkers, Adopted July 10, 1929.

By Mr. Davis:

Resolved, That the First National Bank, Yonkers National Bank and Trust Company, Yonkers Trust Company, Westchester Trust Company, the Bryn-Mawr-Nepperhan National Bank and the Central National Bank be designated as banks and trust companies for the purpose of depositing all moneys of the city received by the
299 City Treasurer of the City of Yonkers; and the City Treasurer is hereby directed to continue to procure adequate security for all moneys deposited by him in any or all of the depositories hereinbefore designated, securing and protecting the City of Yonkers against any loss of the moneys so deposited. The action of the City Treasurer in procuring interest upon the following moneys in the following accounts is hereby approved: On average daily balance of accounts known as General Accounts, two per cent (2%) to be paid semi-annually on the 30th day of June and the 31st day of December; Firemen's Pension Fund, three and one-half per cent (3½%); Police Pension Fund, three and
300 one-half per cent (3½%); Saunders Trade Fund, three per cent (3%). The interest on the last mentioned accounts to be paid semi-annually on the 30th day of June and the 31st day of December in each year.

Adopted by the following vote:

Ayes—Mayor Fogarty, Council President Davis, Comptroller Loehr, Corporation Counsel Laragh and City Engineer Sheridan.

(Certified February 20, 1936.)

301

Defendants' Exhibit D.

(FRONT)

THE CITY OF YONKERS, N. Y.

Department of Finance Bureau of Comptroller

To Firemen's Pension Fund Dr.

Items	Amount
Firemen's Pension Fund, for year ended December 31, 1932	
Members' Contributions $10,380.04	302
City's Contributions (Local Law No. 2 (1931) Section 2) one and one-half (1½) times $10,380.04	$15,570.06
5,190.02	

TO THE COMPTROLLER:

I HEREBY CERTIFY, That the merchandise, materials or articles enumerated in the above account have been received and the services specified performed; that the prices are reasonable and just; that they were necessary for, and have been, or will be, applied to the uses of this Department, *and I further certify that no part of said account amounting in the aggregate to $15,570.06 has been paid or satisfied and that said amount be charged to the appropriate account as indicated on the opposite side of this claim.* 303

Yonkers, 1/4/33

Signed R. E. MARCHAND
Title of Office DEPUTY COMPTROLLER

Defendants' Exhibit D.

(BACK)

Warrant No. 170736

Claim No. 32308 Amount, $15,570.06

CLAIMANT

Firemen's Pension Fund,

Address Yonkers, N. Y.

Account	Amount
Firemen's Pension Fund	$15,570.06
1932	
Current Account	
Total	$15,570.06

Received for audit Jan 5 1933
Approved for payment 1/10/1933
Date of payment Feb 27 1933

MOREY
Auditor.

R. E. MARCHAND
Deputy Comptroller.

307

Findings of Fact.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

308

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188

This cause having duly come on to be tried by the Court without a Jury, and the allegations and proofs of the parties having been fully heard, I find and decide as follows: 309

1. The defendants constitute the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers and have the care, control and management of the fund.

2. On March 4, 1933 the defendants had on deposit in The First National Bank and Trust Company of Yonkers in a checking account captioned "Firemen's Pension Fund City of Yonkers" the sum of $16,590.75. The bank has since September 30, 1929 been a national banking corporation organized and existing under the laws of the United

310 *Findings of Fact.*

States with its principal place of business in the City of Yonkers, County of Westchester and State of New York.

3. The sources of the Firemen's Pension Fund as fixed by statute and local law, are rewards, gifts, fines, salary deductions and contributions from the City of Yonkers.

4. The purposes of the fund are to pay pensions to retired department members or their next of kin and to pay premiums on group life insurance policies covering the lives of department members.

311 5. On March 4, 1933 the Governor of the State of New York proclaimed a bank holiday and the bank did not open for business that day and never afterwards reopened for regular business.

6. On March 6, 1933 the President of the United States proclaimed a bank holiday and on March 9, 1933 the bank holiday was extended by further proclamation of the President.

7. The Comptroller of the Currency, pursuant to statute, appointed a Conservator of the Bank on March 20, 1933 and appointed a successor Conservator on July 24,
312 1933. On January 23, 1934 a Receiver was appointed to liquidate the Bank and the paintiff was appointed successor to such Receiver on November 15, 1937.

8. On July 10, 1929 the Board of Estimate and Apportionment of the City of Yonkers, consisting of the Mayor, the Common Council President, the Comptroller, the Corporation Counsel and the City Engineer, passed a resolution designating five several banks as depositories "for all moneys of the City received by the City Treasurer" and directing the City Treasurer to "continue to procure adequate security for all moneys deposited by him" in the designated depositories.

9. On September 30, 1929 three of the depositories referred to in the resolution were merged under the name The First National Bank and Trust Company of Yonkers.

10. On March 4, 1933 the Bank had on deposit with the City as security for the aforesaid account and for city deposits bonds having a par value of $535,000.

11. The balance of $16,590.75 in the account on March 4, 1933 was paid out in various amounts between March 18, 1933 and October 26, 1933.

12. Between March 29, 1933 and July 20, 1933 the City 314
returned to the Bank the pledged securities to the amount of $534,000 and retained bonds of the par value of $1,000.

13. The Conservator gave receipts for the returned bonds reciting therein "said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers."

14. A first dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 3, 1937.

315

15. No statute of the state of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

16. No statute of the state of New York confers upon state banks the specific power to pledge assets to secure deposits of the City of Yonkers.

17. No applicable ordinance or local law of the City of Yonkers confers upon any bank the power to secure deposits of the City of Yonkers.

316 *Findings of Fact.*

18. Under the common law of the State of New York, as declared by its highest court, state banks lack the power to pledge assets to secure deposits of political subdivisions of the state.

19. That the pledge of assets by the Bank to secure the deposits in the account of the Firemen's Pension Fund City of Yonkers was illegal and *ultra vires.*

20. That the Bank was insolvent as of the 6th day of March, 1933 and that the rights of the general creditors of
317 the Bank became fixed as of March 6, 1933.

21. That the payments to the defendants from the deposit account Firemen's Pension Fund City of Yonkers were made with the view to the preference of the defendants over other creditors of the Bank.

22. That no service of any notice of claim or of intention to sue by the Bank through its Receiver was required.

23. That the payments from the Firemen's Pension Fund City of Yonkers deposit account to the defendants were voluntarily made under a mistake of law but are nevertheless recoverable.

318 24. Plaintiff is entitled to recover the sum of $8,295.38, being the difference between the amount which the defendants should have received under the 50% dividend paid by the Bank and the sum of $16,590.75 paid to the defendants, together with interest and the costs of this action.

25. The plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $9,954.45 from May 1, 1936 to November 2, 1937 and interest at the same rate on the sum of $8,295.38 from November 3, 1937 to the date of the judgment to be entered herein.

Dated, July 18, 1938.

JOHN KNIGHT,
District Judge.

319

Defendants' Requests for Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

320

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

Come now the above named defendants by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, their attorney, and considering the same to be material to the proper presentation of this case, respectfully request the Court to make and enter the following findings of fact and conclusions of law. 321

FINDINGS OF FACT.

1. That The First National Bank and Trust Company of Yonkers was and is for all purposes of this action a National Banking Institution organized and existing under, and by virtue of the laws of the United States of America,

322 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

having its only place of business in the City of Yonkers, State of New York.

2. That the City of Yonkers was and still is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

3. That the defendants, Joseph F. Loehr, James J. Hushion and Dennis M. Morrissey are the Mayor, Comptroller and Commissioner of Public Safety of the City of Yonkers, New York, respectively, and since the 1st day of
323 January, 1932, have constituted the Board of Trustees of the Firemen's Pension Fund of said City of Yonkers, having the care, control and management of said fund.

4. That previous laws of the State of New York and of the City of Yonkers in relation to the Firemen's Pension Fund of the City of Yonkers were superseded and amended by Local Law number 2-1931 of the City of Yonkers, which provides as follows:

"CITY OF YONKERS

LOCAL LAW No. 2—(1931)

324 A LOCAL LAW OF THE CITY OF YONKERS TO AMEND AND SUPERSEDE ARTICLE XII, FIREMEN'S PENSION FUND OF THE SUPPLEMENTAL CHARTER OF SAID CITY, CONTAINED IN CHAPTER 452 OF THE LAWS OF 1908, AS AMENDED, ENTITLED "AN ACT TO SUPPLEMENT THE GENERAL LAWS RELATING TO THE GOVERNMENT OF THE CITY OF YONKERS, AND TO REVISE AND CONSOLIDATE THE LOCAL LAWS RELATING THERETO."

Be it enacted by the Common Council of the City of Yonkers, as follows:

Section 1. Article XII, Firemen's Pension Fund of the Supplemental Charter of the City of Yonkers,

N. Y., being part of Chapter 452 of the Laws of 1908 as amended entitled "An act to supplement the general laws relating to the government of the City of Yonkers, and to revise and consolidate the local laws relating thereto, is hereby amended and superseded to read as follows;

Section 1. The Mayor, the Comptroller and the Commissioner of Public Safety and their successors in office, shall constitute a board of trustees of the Firemen's Pension Fund; and they shall have the care, control, management and distribution of said funds as provided by law. The Comptroller shall be the custodian of the said fund, and the City Treasurer shall be the treasurer thereof. All orders made payable from the said fund shall be made upon the vote of said trustees, and such orders must be signed by the Commissioner of Public Safety, and countersigned by the Comptroller and by the City Treasurer. The trustees of the said fund shall invest for the benefit of the fund all moneys not necessary for the payment of pension, as hereinafter provided. Such investment shall be made only in securities in which the savings banks of the State of New York are authorized by law to invest. In addition to and as part of the pensions hereinafter specified, the said trustees are directed to cause group life insurance policies in sum of One Thousand Dollars per member to be issued upon the life of such member while employed in such service and until retirement therefrom and to pay out of said fund the premiums due thereon, provided the beneficiary named in said policies shall be limited to the widow, minor children under 18 years of age, or next of kin, of such member. The trustees of the said fund shall report in

detail to the Common Council annually in the month of January, the condition and the disposition of the fund, and the items of receipts and disbursements for account of the same during the year ending on the thirty-first day of the December preceding, including insurance policies then outstanding.

Section 2. The firemen's pension fund as it now exists is continued; and in addition to the moneys and investments therein contained it shall consist of:

1. All fines imposed by the Commissioner of Public Safety on the members of the Fire Department in the City of Yonkers.

2. All rewards, money, gifts, testimonials and emoluments that may be paid or given to any member of the Fire Department, for account of fire service, except such payments or gifts as have been or shall be allowed by the Commissioner of Public Safety to be retained by the members receiving the same.

3. All money, pay, compensation or salary or any part thereof deducted or withheld from any member or members of the Fire Department, for or on account of absence or suspension from duty except in cases of sickness.

4. All moneys which shall be deducted from the monthly pay, salary or compensation of each member of said department and which shall be the sum of two per centum of the monthly pay, salary or compensation of each of the said members; which said sum shall be deducted monthly by the Comptroller of the City of Yonkers from the pay, salary

or compensation of each and every member of said Fire Department. And the Comptroller is hereby authorized, empowered and directed to deduct the said two per centum of the monthly pay, salary or compensation as aforesaid, and to cause the same to be paid forthwith to the trustees of the said Firemen's Pension Fund.

5. An amount payable to the trustees of the Firemen's Pension Fund out of the City treasury at the end of each fiscal year equivalent to one-and one-half times the amount of moneys deducted from the monthly pay, salary or compensation of each member of said Fire Department during such year, as provided by subdivision six of this section. Whenever, in any calendar year the disbursements from said fund shall exceed the total income thereof, and the principal sum of said fund is less than $250,000 there shall be included in the next annual budget and levy a sum to equal the amount of such deficiency for such previous year, and the same paid to the trustees of said fund. 332

Section 3. RETIREMENTS: The Commissioner of Public Safety shall have the power and authority to retire from all service in the Fire Department and relieve and dismiss from the said Department any member or officer of the Department who, upon an examination by the Fire Surgeon ordered by the said Commissioner, is found to be disqualified physically or mentally in the performance of his duties. 333

The Commissioner of Public Safety shall retire from all service in the Fire Department and relieve and dismiss from the said department, members or officers thereof in the following cases:

(a) Notwithstanding the provisions of Section 136, Second Class Cities Law, Chapter 55, Laws of 1909, as amended, the Commissioner of Public Safety is hereby directed to retire from all service in the Fire Department, any member or officer attaining the age of sixty-four years and it is the purpose of this provision to retire the said member by operation of law and not by the exercise of any discretion on the part of the Commissioner of Public Safety. The record of the Department of Public Safety as to the age of the various members and officers supplied to the said Department at the time of the appointment of the said member shall be controlling as to his age.

(b) Any member or officer of the Department, regardless of the age of the said member, who shall have served continuously as a member or officer of the Department for a period of twenty-five years at the time of his application for retirement, provided that such member or officer applies for retirement. Nothing in this section contained shall, however, be construed as a limitation on the powers otherwise conferred by law with respect to the removal or dismissal of members or officers of the Fire Department. No refunds for salary deductions shall be made to members dismissed from said force, or to any member who resigns before being entitled to a pension hereunder.

Section 4. The said board of trustees shall grant pensions out of said pension fund, in the following cases:

1. To any member or officer of the Fire Department who shall have been retired for disability and

who has been relieved and dismissed from the Fire Department and who has been placed on the pension roll, as provided in section three of this article, an annual pension payable monthly during his lifetime of a sum of money amounting to one-half of the full salary or compensation received by such member or officer at the date of his retirement from services; and said pension or allowance so allowed is to be in lieu of any salary which such member or officer was entitled to receive at the date of his being so 338
relieved or retired from duty and the City shall not be held liable for any payment of any claim or demand for service thereafter rendered by the member or officer of the force so retired.

2. To the widow of any member of the fire force who shall have been killed while in the actual performance of fire duty, or who shall have died from the effects of any injuries received in the actual discharge of such duty one half of the annual salary of such member at the time of death, payable to said widow during her lifetime, unless she remarries when said pension is to terminate.

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To the widow of any such member, who has died, or shall hereafter die after three months of service on said fire force, a sum not exceeding six hundred dollars per year, during widowhood. If there be no widow then the sum of $600.00 shall be paid to the child or children of such member until such child or children arrives at the age of eighteen years, when such pension is to terminate as to each child. If there be no widow or child or children under the said age of eighteen years, then said sum of $600.00 shall be paid to the next of kin of such deceased member, said sum to be paid thereafter to such next

of kin for one half the number of years of service to the credit of such deceased member.

To the widow of such member, who shall have been retired on a pension, or who shall hereafter be retired on a pension, a sum not exceeding six hundred dollars per year, during widowhood. If there be no widow then the said sum of $600.00 shall be paid to the child or children of such member until such child or children arrives at the age of eighteen years, when such pension is to terminate as to each child. If there be no widow or child or children under said age of eighteen years, then said sum of $600.00 shall be paid to dependent parent, for one half the number of years of service to the credit of such deceased member.

3. Pensions to widows shall terminate when the widow shall re-marry, and pensions to children shall terminate whenever the children shall respectively arrive at the age of eighteen years.

4. The said trustees are authorized to increase existing $300.00 pension to widows and children under eighteen years of age of deceased members to a sum not exceeding $600.00 to take effect from the time of granting such increase to such widow or children.

5. Every person who knowingly or wilfully in anywise procures the making or presentation of any false or fraudulent affidavit or affirmation concerning any claim for pension or payment thereof, shall be in every such case forfeit a sum not exceeding two hundred and fifty dollars to be sued and recovered by and in the name of said trustee of said Firemen's Fund and when recovered paid over to and become a part of said Firemen's Pension Fund.

6. For the purpose of this act the board of trustees of said Firemen's Pension Fund is hereby authorized to administer oaths and make acknowledgments; and any person who shall wilfully swear falsely in any oath or affirmation in obtaining or procuring any pension under the provisions of this act shall be guilty of perjury. The Comptroller is authorized to require sworn proof of beneficiary's identity before delivery of any pension check hereunder.

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7. Moneys, securities and effects of said Firemen's Pension Fund and all pensions granted and payable from said fund shall be and are hereby exempt from execution and from all process and proceedings to enjoin and recover the same by or on behalf of any creditor or pensioner having or assisting any claim against or debt or liability of any pensioner of said fund.

8. The members of said Fire Department whose salaries contribute to said pension fund shall annually select two of their members and the pensioners shall annually select one of their members; and the persons so selected shall constitute an auditing committee and shall audit the accounts and proceedings of the said trustees and make and file with the Clerk of the City of Yonkers a written report.

345

Section 5. In case any part of this act is declared invalid the remaining part shall continue in full force and virtue.

Section 6. Article XXI, Firemen's Pension Fund incorporated in Supplemental Charter as part of Chapter 459, Laws of 1908, is hereby superseded.

Section 7. This Local Law shall take effect as prescribed by the City Home Rule Law.

Adopted by the Common Council at a stated meeting held November 10th, 1931, by a vote of ten to one.

JOHN S. DAVIS,
President of the Common Council.

Attest:
JOHN S. KETTELL,
City Clerk.

Approved November 23, 1931.
JOHN J. FOGARTY,
Mayor."

5. That by a resolution adopted by the Board of Estimate and Apportionment of the City of Yonkers on July 10, 1929, certain banks were designated as depositaries for all moneys of the City deposited by the City Treasurer and the City Treasurer was directed to "continue to procure adequate security for all moneys deposited by him" in the designated depositaries.

6. That on March 4, 1933, The First National Bank and Trust Company of Yonkers, the successor by merger to three of the depositaries designated in the resolution of the Board of Estimate and Apportionment of Yonkers of July 10, 1929, had on pledge with the City of Yonkers, bonds of the par value of $535,000 which had been procured by the City Treasurer of the City of Yonkers pursuant to said resolution of July 10, 1929, from time to time prior thereto to secure, among other deposits, deposits of the defendants made by said City Treasurer in an account, to wit: Firemen's Pension Fund, City of Yonkers, in the sum of $16,590.75.

 349

7. That on March 4, 1933, the defendants had on deposit in The First National Bank and Trust Company of Yonkers in the account "Firemen's Pension Fund, City of Yonkers," $16,590.75.

8. That the moneys on deposit in the First National Bank and Trust Company of Yonkers, in the account, "Firemen's Pension Fund, City of Yonkers," in the sum of $16,590.75 were public funds.

9. That on Saturday, March 4, 1933, the Governor of the State of New York issued a Proclamation declaring a banking holiday. 350

10. That the Governor's Proclamation of March 4, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

11. That The First National Bank and Trust Company was solvent on March 4, 1933.

12. That on Monday, March 6, 1933, the President of the United States issued a Proclamation declaring a banking holiday until March 9, 1933.

13. That the President's Proclamation of March 6, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent. 351

14. That The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

15. That on March 9, 1933, the President of the United States issued a Proclamation continuing the Proclamation of March 5, 1933, until further proclamation by the President.

16. That the President's Proclamation of March 9, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

352 17. That The First National Bank and Trust Company of Yonkers was solvent on March 9, 1933.

18. That on March 20, 1933, pursuant to Bank Conservation Act of March 9, 1933, the Comptroller of the Currency appointed Percival W. Trudeau Conservator of The First National Bank and Trust Company of Yonkers.

19. That The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

353 20. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers was under the management and control of its own officers.

21. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company was permitted to transact such business as any other bank was permitted to transact under the Presidential Proclamations of March 6, and 9, 1933.

22. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers had the right to make payments on account of pension checks
354 drawn against funds deposited prior to March 4, 1933.

23. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers paid out of the funds deposited prior to March 4, 1933, in the account "Firemen's Pension Fund, City of Yonkers" the sum of $150 upon pension checks issued by the defendants and signed by the Comptroller and by the Treasurer of the City of Yonkers, such payments having been made in the following amounts on the following dates, respectively:

March 18, 1933	$100
March 20, 1933	50

355

24. That on March 28, 1933, Percival W. Trudeau, in consideration (1) of the defendants' releasing their lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City, (2) of the defendants' not foreclosing their said lien in the State Courts, (3) of the City's surrendering the said assets so deposited, agreed with the defendants that he would pay out of the funds of the defendants remaining on deposit with The First National Bank and Trust Company provided the City would return the bonds deposited with the City as security as the funds were paid out.

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25. That on March 28, 1933, The First National Bank and Trust Company of Yonkers by and with the consent of Percival W. Trudeau, Conservator, paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Firemen's Pension Fund, City of Yonkers" the sum of $37.50 upon pension checks issued by the defendants and signed by the Comptroller and by the Treasurer of the City of Yonkers.

26. That on March 28, 1933, pursuant to the said agreement between Percival W. Trudeau and the defendants, the City of Yonkers, in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for defendants' deposits, among others, of the par value of $197,000.

357

27. That on July 24, 1933, Louis B. Rossire was appointed successor Conservator by the Comptroller of the Currency; that on January 23, 1934, the Comptroller of the Currency appointed Arthur E. Muth as Receiver of The First National Bank and Trust Company of Yonkers and

on November 15, 1937, the said Comptroller appointed Walter F. Downey, plaintiff herein successor Receiver.

28. That from March 28, 1933, to January 23, 1934, The First National Bank and Trust Company of Yonkers, by, and with the consent of Percival W. Trudeau, Conservator, and Louis B. Rossire, successor Conservator, voluntarily paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Firemen's Pension Fund, City of Yonkers," the sum of $16,403.25 upon pension
359 checks issued by the defendants and signed by the Comptroller and by the Treasurer of the City of Yonkers, such payments having been made in the following amounts on the following dates, respectively:

March	31, 1933	$ 220.83
April	1, 1933	2,358.89
April	3, 1933	1,925.00
April	4, 1933	304.17
April	5, 1933	343.75
April	6, 1933	150.00
April	7, 1933	197.91
April	10, 1933	102.08
April	13, 1933	95.83
April	29, 1933	104.17
May	1, 1933	2,341.68
May	2, 1933	1,002.09
May	3, 1933	6,219.36
May	4, 1933	691.66
May	6, 1933	195.83
May	8, 1933	50.00
May	9, 1933	50.00
Oct.	26, 1933	50.00

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except that one check dated May 2, 1933, for $5,636.02 was not a pension check, but represented the balance in said account which was withdrawn and deposited in a new pension account in the Central National Bank of Yonkers.

29. That the moneys paid out of the account "Firemen's Pension Fund, City of Yonkers" by The First National Bank and Trust Company were payments made in the regular course of business in such bank.

30. That between March 29, 1933, and January 23, 1934, 362
pursuant to the said agreement between Percival W. Trudeau and the defendants, the City of Yonkers, in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for defendants' deposits of the par value of $337,000 on the dates and in the amounts as follows:

April 3, 1933	$193,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

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leaving $1,000 of said bonds in the hands of the City of Yonkers.

31. That Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, gave receipts to the City of Yonkers for the securities upon their surrender, each of which receipts contained the following provision:

> "Said securities being released as pledged to secure deposits of the City of Yonkers, said release

364 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

being in all respects without prejudice to the City of Yonkers"

32. That on December 16, 1933, a first dividend of 40 per cent. and on November 3, 1937, a second dividend of 10 per cent. were made available to unsecured depositors of The First National Bank and Trust Company of Yonkers.

33. That the defendants were secured depositors to the extent of deposits in the account "Firemen's Pension Fund,
365 City of Yonkers," in the sum of $16,590.75.

34. That the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company deposited with the City of Yonkers as security for their deposits.

35. That no claim was ever filed with the City of Yonkers or any officer thereof for the claim alleged in the complaint herein.

36. That no notice of claim and no notice of intention to sue was ever filed with the City of Yonkers or any officer thereof with respect to the claim alleged in the complaint
366 herein.

37. That The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

38. That all of the moneys paid by The First National Bank and Trust Company of Yonkers out of the account "Firemen's Pension Fund, City of Yonkers", were paid while said bank was solvent.

39. That no demand was ever made upon the defendants, the City of Yonkers, or its officers or employees for the return of any of the money sued for herein.

Defendants' Requests for Findings of Fact and Conclusions of Law. 367

40. That the Treasurer of the City of Yonkers is and was a person receiving and depositing moneys belonging to the State of New York.

41. That the several acts found to have been done herein by the City of Yonkers were done on behalf of and as agent for the defendants.

CONCLUSIONS OF LAW.

1. That the defendants are entitled to judgment dismissing the complaint with costs. 368

2. That the City of Yonkers was and is a political subdivision of the State of New York, and was and is a city of the Second Class under Chapter 55 of the Laws of 1909 of New York, as amended.

3. That the funds deposited by the defendants in The First National Bank and Trust Company of Yonkers in account, "Firemen's Pension Fund, City of Yonkers", in the sum of $16,590.75 were public funds.

4. That the Proclamation of the Governor of New York of March 4, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent. 369

5. That the Proclamtion of the President of the United States of March 6, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

6. That the Proclamation of the President of the United States of March 9, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

370 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

7. That the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

8. That the appointment of Louis D. Rossire, as successor Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

371 9. That solvency is presumed until the contrary is proved.

10. That The First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

11. That the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to March 20, 1933.

12. That the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

372 13. That the plaintiff is not entitled to recover deposits of the defendants paid out by The First National Bank and Trust Company of Yonkers prior to its insolvency.

14. That the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

15. That the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to March 20, 1933.

Defendants' Requests for Findings of Fact and Conclusions of Law. 373

16. That the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to January 23, 1934.

17. That a conservator of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

18. That a conservator of a national bank appointed by the Comptroller of the Currency is not an officer of the Court. 374

19. That a receiver of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

20. That a receiver of a national bank appointed by the Comptroller of the Currency is not an officer of the Court.

21. That the negotiation of a settlement of claims against The First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same, was within the scope of the authority of Percival W. Trudeau, as Conservator of said bank. 375

22. That the agreement of March 28, 1933 between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants was based upon a good and valid consideration.

23. That the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants constituted an accord and satisfaction.

376 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

24. That the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency.

25. That National Banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

26. That the validity, force and effect of the agreement
377 of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants is determined by the laws of New York, the place of making.

27. That the defendants were entitled to a preference in the payment of their funds upon liquidation of The First National Bank and Trust Company of Yonkers.

28. That under the law of the State of New York state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions thereof, in such banks.

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29. That The First National Bank and Trust Company was authorized by law to give security for the safekeeping and prompt payment of public funds deposited with it by the defendants.

30. That The First National Bank and Trust Company of Yonkers' depositing assets with the City of Yonkers as security for the defendants' deposits of public funds was lawful.

31. That the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among other deposits, deposits by the defendants in the account,

"Firemen's Pension Fund, City of Yonkers", in the sum of $16,590.75, was lawful.

32. That the defendants were secured depositors of The First National Bank and Trust Company of Yonkers.

33. That if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with the City of Yonkers should serve as security for all of said City's deposits was beyond the powers of the said Bank, the rights and obligations of the plaintiff and defendant arising therefrom are determined by the laws of the 380
State of New York.

34. That in order to repossess itself of the assets, given to secure the deposits of the defendants, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to the defendants.

35. That the payments of deposits between March 4, 1933, and March 20, 1933, to the defendants by The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the 381
Secretary of the Treasury.

36. That the payments of deposits between March 20, 1933, and March 28, 1933, to the defendants by the Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

37. That the payments of deposits between March 28, 1933, and January 23, 1934, to the defendants by the Con-

servator and successor Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

38. That the defendants were creditors of The First National Bank and Trust Company of Yonkers.

383 39. That the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as security for the indebtedness.

40. That the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City of Yonkers as security for their deposits.

41. That this action was not commenced within the time limited by law.

42. That the defendants are prohibited by law from paying the claim alleged in the complaint.

384 43. That the City of Yonkers, its officers and boards are prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the claimant, and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller, and shall have been audited and allowed by him.

44. That the City of Yonkers, its officers and boards are not liable in a civil action for damages or injuries to person or property, or invasion of personal or property rights, of any name or nature whatsoever, arising at law or in equity, alleged to have been caused or sustained by or

because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the City, or any of its agents, officers or employees, unless a claim therefor in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or on account of which the claim arose, be presented to the Common Council and served upon the Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall be commenced thereon within one year after the happening of such accident or injury or the occurrence of such act, omission, fault or neglect.

In the event of a denial by the Court of defendants' requests for the foregoing findings of fact and conclusions of law or any part thereof, defendants respectfully request the Court to grant an exception or exceptions to defendants.

Dated, Yonkers, N. Y., July , 1938.

Respectfully submitted,

LEONARD G. MCANENY,
Attorney for defendants.

388 **Rulings on Defendants' Requests for Findings of Fact and Conclusions of Law.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

389 *against*

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

390 Appearances:

BENJAMIN W. MOORE, Yonkers, N. Y.; for Plaintiff.

LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y.; and MORRIS L. ROSENWASSER and HAROLD T. GARRITY, of Counsel; for Defendant.

KNIGHT, District Judge:

The Court finds with respect to the Defendant's Findings of Fact and concludes as to the Conclusions of Law submitted in this case as follows:

Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law. 391

FINDINGS OF FACT.

1. Found.
2. Found.
3. Found.
4. Found, except as to section 3 *et seq.*
5. Found.
6. Found.
7. Found.
8. Refused.
9. Found. 392
10. Found.
11. Refused.
12. Found.
13. Refused.
14. Refused.
15. Found.
16. Refused.
17. Refused.
18. Found.
19. Refused.
20. Refused.
21. Refused. 393
22. Refused.
23. Found, except that request should show payment of March 20, 1933, as made by Conservator.
24. Refused.
25. Found.
26. Refused.
27. Found.
28. Found.
29. Refused.
30. Refused.
31. Found.

394 *Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law.*

32. Found.
33. Refused.
34. Refused.
35. Found.
36. Found.
37. Refused.
38. Refused.
39. Found.
40. Refused.
41. Refused.

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CONCLUSIONS OF LAW.

1. Refused.
2. Found.
3. Refused.
4. Found.
5. Found.
6. Found.
7. Refused.
8. Refused.
9. Refused.

396

10. Refused.
11. Refused.
12. Refused.
13. Refused.
14. Refused.
15. Refused.
16. Refused.
17. Found.
18. Found.
19. Found.
20. Found.
21. Refused.

Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law. 397

22. Refused
23. Refused.
24. Refused.
25. Refused.
26. Refused.
27. Refused.
28. Refused.
29. Refused.
30. Refused.
31. Refused.
32. Refused. 398
33. Refused.
34. Refused.
35. Refused.
36. Refused.
37. Refused.
38. Found.
39. Refused.
40. Refused.
41. Refused.
42. Refused.
43. Refused.
44. Refused. 399

July 18, 1938.

JOHN KNIGHT,
United States District Judge.

Filed July 29, 1938.

400 **Defendants' Exceptions.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

401 JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

Exceptions are allowed the defendants as noted in the
402 stenographic minutes of the trial herein, and to the findings numbered 5, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 contained in the findings of the Court, dated July 18, 1938, and to the denial of findings of fact numbered 4, 8, 11, 13, 14, 16, 17, 19, 20, 21, 22, 23, 24, 26, 29, 30, 33, 34, 37, 38, 40 and 41 and to the denial of conclusions of law numbered 1, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, and 44 as requested by the defendants, this 27th day of October, 1938.

JOHN KNIGHT,
U. S. D. J.

and the defendants pray that its bill of exceptions may be allowed, settled and signed.

LEONARD G. MCANENY,
Attorney for Defendants.

403

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the bill of exceptions herein contains all the material facts, proceedings, rulings and exceptions thereto occurring upon the trial of this cause and not heretofore a part of the record herein and that the exhibits set forth or referred to constitute all the exhibits offered in evidence at the said trial and that the same may be settled and allowed in the form proposed and submitted and ordered on file as a bill of exceptions herein.

Dated, Yonkers, New York, November 17, 1938. 404

BENJ. W. MOORE,
Attorney for Plaintiff,

LEONARD G. MCANENY,
Attorney for Defendants.

Order Settling Bill of Exceptions.

It appearing that the foregoing bill of exceptions contains all of the material facts, matters, things, proceedings, rulings, and exceptions thereto, occurring upon the trial of this cause, and not heretofore a part of the record herein, including all evidence adduced at the said trial; and that the exhibits set forth in the foregoing bill of exceptions constitute all of the exhibits offered in evidence in the said trial, 405

I hereby settle and allow the foregoing bill of exceptions as a full, true, and correct bill of exceptions in this cause and order the same on file, and further order the clerk of this Court to transmit said entire bill of exceptions to the Circuit Court of Appeals for the Second Circuit.

Dated this 18th day of November, 1938.

JOHN KNIGHT,
U. S. D. J.

406

Opinion of Court.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

407

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

Appearances:

408

BENJAMIN W. MOORE, Yonkers, N. Y., for Plaintiff.

LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y., MORRIS L. ROSENWASSER; and HAROLD T. GARRITY, of Counsel for Defendants.

Hon. JOHN KNIGHT, District Judge:

This suit was tried together with the action of Walter F. Downey, Receiver *v.* City of Yonkers, decided herewith. The opinion in that action is applicable here. On March 4, 1933, the First National Bank and Trust Company of Yonkers had on its books deposit account captioned: "Fire-

men's Pension Fund, City of Yonkers." The balance of this account on March 4, 1933, was $16,590.75. This balance was paid out by the Conservator of the bank in various amounts between March 18, 1933, and October 26, 1933, inclusive. All the payments were on pension checks drawn to the pensioners of the Firemen's Pension Fund, except that $5,636.02 represented a balance in the account. These deposits were made pursuant to resolution adopted by the Board of Estimate and Apportionment on July 10, 1929. The bank pledged with the City certain bonds as security for these deposits. A distinction between the two cases is 410
claimed in respect to the nature of the deposit—whether public or private. In my view this makes no difference. It is not necessary to decide in which category this is to be listed. This question was discussed in the above mentioned opinion in connection with the Nepperhan Valley Sewer deposit. For the reasons assigned in Downey *v.* City of Yonkers, the pledge of these securities was *ultra vires,* and the deposits paid therefrom are recoverable by the Receiver.

Plaintiff is entitled to recover the sum of $8,295.38, being the difference between the amount which the city should have received under the fifty per cent. dividend paid by the bank and the sum of $16,590.75 paid to the city, together with interest from April, 1936. 411

Findings may be submitted to be signed and be made a part of the decision herein.

June 8, 1938.

JOHN KNIGHT,
United States District Judge.

412

Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

413

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

414 The issues in this action having been regularly brought on for trial before Hon. John Knight, District Judge, on the 4th day of January, 1938, without a Jury, and the plaintiff having appeared by Benjamin W. Moore, his attorney, and Milton L. Romm, of counsel, and the defendants having appeared by Leonard G. McAneny, Esq., Corporation Counsel, and Morris L. Rosenwasser, Esq. and Harold T. Garrity, Esq., Assistant Corporation Counsels, and the court having heard the allegations and proofs of the parties and having filed its opinion, dated June 8, 1938, and its findings of fact and conclusions of law, dated July 18, 1938, directing judgment as hereinafter stated, and the costs of the plaintiff having been duly taxed at $77.85

Opinion of Court as to Applicability of Rules of Civil Procedure. 415

Now, on motion of Benjamin W. Moore, attorney for the plaintiff, it is

ADJUDGED that the plaintiff, Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, do recover of the defendants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, the sum of $8,295.38 together with interest thereon in the sum 416
of $1,277.98 and the sum of $77.85 costs as taxed, making in all the sum of $9,651.21 and that the plaintiff have execution therefor against the defendants Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers.

Judgment signed this 5th day of August, 1938.

CHARLES WEISER,
Clerk.

417

Opinion of Court as to Applicability of Rules of Civil Procedure.

The motion in each of these cases for an order limiting exceptions herein pursuant to new Rule 46 is denied. Irrespective of the question of whether new Rule 86 applies to actions in which final judgment had been entered prior to the effective date of the new rules, it is my view that the application of the new rules would not be feasible and work injustice to the defendant.

An order may be submitted to conform with this communication.

JOHN KNIGHT,
U. S. D. J.

418

Order Denying Motion to Apply New Rules on Appeal.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court House thereof in the Borough of Manhattan, City of New York, on the 18th day of October, 1938.

Present:

HON. JOHN KNIGHT,
District Judge.

419

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

420 L. 63-188.

The defendants having moved this Court for an order invoking the application of the Federal Rules of Civil Procedure to this action with respect to Rule 46 eliminating

Order Denying Motion to Apply New Rules on Appeal. 421

the necessity for exceptions and Rule 73 eliminating the necessity of assignments of error, and said motion having been submitted by Leonard G. McAneny, Esq., attorney for the defendants, and by Benjamin W. Moore, attorney for the plaintiff, by Milton L. Romm, of counsel.

Now, on reading and filing the notice of motion dated the 20th day of September, 1938 and the affidavit of Leonard G. McAneny, thereto annexed, verified the 20th day of September, 1938, in support of said motion, and the affidavit of Benjamin W. Moore, verified the 3rd day of October, 1938, in opposition thereto, it is 422

ORDERED, that the motion be and it hereby is in all respects denied.

JOHN KNIGHT,
District Judge.

423

424 **Petition and Order Allowing Appeal.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

425 JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

To the Honorable William Bondy, Judge of the District
426 *Court, sitting for the Southern District of New York.*

Now come the defendants-appellants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, by Leonard G. McAneny, their attorney, and feeling themselves aggrieved by the judgment of this Court entered on the 5th day of August, 1938, hereby pray that an appeal may be allowed to them from said judgment, to the United States Circuit Court of Appeals for the Second Circuit, and that citation issue, and, in connection with this petition, petitioners herewith present their assignment of errors.

Petition and Order Allowing Appeal.

Petitioners further pray that an order be made fixing the amount of the bond to be given by defendants for costs, and a proper transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, shall be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated: Yonkers, New York, October 28th, 1938.

LEONARD G. MCANENY,
Corporation Counsel, Attorney for
Defendants-Appellants.

The above appeal is hereby allowed.

Dated: New York, N. Y., October 31st, 1938.

WM. BONDY,
U. S. D. J.

A bond for costs in the usual form was duly approved and filed in the office of the clerk of the Court on October 31, 1938.

430 **Assignments of Error and Prayer for Reversal.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

431 JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

Now COME the defendants-appellants, Joseph F. Loehr,
432 Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, Constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, by Leonard G. McAneny, Corporation Counsel their attorney, and submit, present and file their assignments of error complained of and say:

That in the records and proceedings of the Honorable United States District Court for the Southern District of New York in a certain action entitled "Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, Plaintiff, against Joseph F.

Loehr, Mayor, James J. Hushion, Comptroller; and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, Defendants'', and in the determination of the issues raised, there is manifest error to the injury and prejudice of the said appellants, and for such error the appellants assign the following:

1. The said court erred in finding that The First National Bank and Trust Company of Yonkers did not open for business on March 4, 1933 and never afterwards reopened for regular business. 434

2. The said court erred in finding that no statute of the State of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

3. The said court erred in finding that no statute of the State of New York confers upon state banks the specific power to pledge assets to secure deposits of the City of Yonkers.

4. The said court erred in finding that no applicable ordinance or local law of the City of Yonkers confers upon any bank the power to secure deposits of the City of Yonkers. 435

5. The said court erred in finding that under the common law of the State of New York as declared by its highest court, state banks lacked the power to pledge assets to secure deposits of political subdivisions of the state.

6. The said court erred in finding that the pledge of assets by the bank to secure the deposits in the account of the Firemen's Pension Fund, City of Yonkers, was illegal and ultra vires.

436 *Assignments of Error and Prayer for Reversal.*

7. The said court erred in finding that the bank was insolvent as of the 6th day of March, 1933 and that the rights of general creditors of the bank became fixed as of March 6, 1933.

8. The said court erred in finding that the payments to the defendants from the deposit account Firemen's Pension Fund, City of Yonkers, were made with the view to the preference of the defendants over other creditors of the bank.

437 9. The said court erred in finding that no service of any notice of claim or of intention to sue by the bank through its Receiver was required.

10. The said court erred in finding that the payments from the Firemen's Pension Fund, City of Yonkers, deposit account to the defendants were voluntarily made under mistake of law, but are nevertheless recoverable.

11. The said court erred in finding that plaintiff is entitled to recover the sum of $8,295.38; being the difference between the amount which the defendants should have received under the 50% dividend paid by the bank and the sum of $16,590.75 paid to the defendants together with
438 interest and the costs of this action.

12. The said court erred in finding that the plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $9,954.45 from May 1, 1936 to November 2, 1937 and interest at the same rate on the sum of $8,295.38 from November 3, 1937 to the date of the judgment to be entered herein.

13. The said court erred in failing to find that Local Law number 2—1931 of the City of Yonkers, contained all of the provisions set forth in paragraph numbered "4" in defendants' Requests for Findings of Fact and Conclusions of Law.

14. The said court erred in failing to find that the monies on deposit in The First National Bank and Trust Company of Yonkers in the account "Firemen's Pension Fund, City of Yonkers" in the sum of $16,590.75 were public funds.

15. The said court erred in failing to find that The First National Bank and Trust Company was solvent on March 4, 1933.

16. The said court erred in failing to find that the President's Proclamation of March 6, 1933 did not declare 440
that The First National Bank and Trust Company of Yonkers was insolvent.

17. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

18. The said court erred in failing to find that the President's Proclamation of March 9, 1933 did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

19. The said court erred in failing to find that The First National Bank and Trust Company was solvent on March 441
9, 1933.

20. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

21. The said court erred in failing to find that from March 6, 1933 to March 20, 1933 The First National Bank and Trust Company of Yonkers was under the management and control of its own officers.

22. The said court erred in failing to find that from March 6, 1933 to March 20, 1933 The First National Bank

442 *Assignments of Error and Prayer for Reversal.*

and Trust Company was permitted to transact such business as any other bank was permitted to transact under the presidential proclamation of March 6, 1933.

23. The said court erred in failing to find that from March 6, 1933 to March 20, 1933 The First National Bank and Trust Company of Yonkers had the right to make payments on account of pension checks drawn against funds deposited prior to March 4, 1933.

24. The said court erred in failing to find that on March
443 28, 1933 Percival W. Trudeau, in consideration

(1) of the defendants' releasing their lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City

(2) of the defendants not foreclosing their said lien in the state courts

(3) of the city's surrendering the said assets so deposited,

agreed with the defendants that he would pay out the funds of the defendants remaining on deposit with The First National Bank and Trust Company, provided the city would
444 return the bonds deposited with the city as security as the funds were paid out.

25. The said court erred in failing to find that on March 28, 1933, pursuant to the said agreement between Percival W. Trudeau and the defendants, The City of Yonkers in consideration of said agreement and in reliance thereon surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said city as security for defendants' deposits, among others, of the par value of $197,000.

26. The said court erred in failing to find that the monies paid out of the account "Firemen's Pension Fund, City of Yonkers", by The First National Bank and Trust Company were payments made in the regular course of business of such bank.

27. The said court erred in failing to find that between March 29, 1933 and January 23, 1934, pursuant to the said agreement between Percival W. Trudeau and the defendants, The City of Yonkers, in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery 446
to said Percival W. Trudeau, Conservator, bonds, held by the said city as security for defendant's deposits of the par value of $337,000 on the dates and in the amounts as follows:

April 3, 1933	$195,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

leaving $1,000 of said bonds in the hands of The City of Yonkers. 447

28. The said court erred in failing to find that the defendants were secured depositors to the extent of deposits in the account "Firemen's Pension Fund, City of Yonkers" in the sum of $16,590.75.

29. The said court erred in failing to find that the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company, deposited with The City of Yonkers as security for their deposits.

448 *Assignments of Error and Prayer for Reversal.*

30. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

31. The said court erred in failing to find that all of the monies paid by The First National Bank and Trust Company of Yonkers out of the account "Firemen's Pension Fund, City of Yonkers" were paid while said bank was solvent.

32. The said court erred in failing to find that the Treasurer of The City of Yonkers is and was a person 449 receiving and depositing moneys belonging to the State of New York.

33. The said court erred in failing to find that the several acts found to have been done by The City of Yonkers were done on behalf of and as agents for the defendants.

34. The said court erred in failing to make the conclusion of law that the defendants are entitled to judgment dismissing the complaint with costs.

35. The said court erred in failing to make the conclu- 450 sion of law that the funds deposited by the defendants in The First National Bank and Trust Company of Yonkers in the account "Firemen's Pension Fund, City of Yonkers" in the sum of $16,590.75 were public funds.

36. The said court erred in failing to make the conclusion of law that the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

37. The said court erred in failing to make the conclusion of law that the appointment of Louis D. Rossire as successor Conservator of The First National Bank and

Trust Company of Yonkers did not create a presumption that said bank was insolvent.

38. The said court erred in failing to make the conclusion of law that solvency is presumed until the contrary is proved.

39. The said court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

40. The said court erred in failing to make the conclusion of law that the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to March 20, 1933. 452

41. The said court erred in failing to make the conclusion of law that the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

42. The said court erred in failing to make the conclusion of law that the plaintiff is not entitled to recover deposits of the defendants paid out by The First National Bank and Trust Company of Yonkers, prior to its insolvency. 453

43. The said court erred in failing to make the conclusion of law that the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

44. The said court erred in failing to make the conclusion of law that the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to March 20, 1933.

454 *Assignments of Error and Prayer for Reversal.*

45. The said court erred in failing to make the conclusion of law that the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to January 23, 1934.

46. The said court erred in failing to make the conclusion of law that the negotiations of a settlement of claims against The First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same,
455 was within the scope of the authority of Percival W. Trudeau as Conservator of said bank.

47. The said court erred in failing to make the conclusion of law that the agreement of March 28, 1933 between Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers and the defendants was based upon a good and valid consideration.

48. The said court erred in failing to make the conclusion of law that the agreement of March 28, 1933 between Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers and the defendants
456 constituted an accord and satisfaction.

49. The said court erred in failing to make the conclusion of law that the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency.

50. The said court erred in failing to make the conclusion of law that national banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

51. The said court erred in failing to make the conclusion of law that the validity, force and effect of the agree-

ment of March 28, 1933 between Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers and the defendants is determined by the laws of New York, the place of making.

52. The said court erred in failing to make the conclusion of law that the defendants were entitled to a preference in the payment of their funds upon liquidation of The First National Bank and Trust Company of Yonkers.

53. The said court erred in failing to make the conclusion of law that under the law of the State of New York 458
state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions thereof, in such banks.

54. The said court erred in failing to make the conclusion of law that The First National Bank and Trust Company was authorized by law to give security for the safekeeping and prompt payment of public funds deposited with it by the defendants.

55. The said court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers' deposit of assets with The City of 459
Yonkers as security for the defendants' deposits of public funds was lawful.

56. The said court erred in failing to make the conclusion of law that the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among other deposits, deposits by the defendants in the account "Firemen's Pension Fund, City of Yonkers" in the sum of $16,590.75 was lawful.

57. The said court erred in failing to make the conclusion of law that the defendants were secured depositors of The First National Bank and Trust Company of Yonkers.

58. The said court erred in failing to make the conclusion of law that if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with The City of Yonkers should serve as security for all of said city's deposits was beyond the powers of the said bank, the rights and obligations of the plaintiff and defendants arising therefrom are determined by the laws of the State of New York.

59. The said court erred in failing to make the conclusion of law that in order to repossess itself of the assets
461 given to secure the deposits of the defendants, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to the defendants.

60. The said court erred in failing to make the conclusion of law that the payments of deposits between March 4, 1933 and March 20, 1933 to the defendants by The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the Proclamation of the President of March 6, 1933, the executive order of March 10, 1937 and Regulation number 10 of the Secretary of the Treasury.
462

61. The said court erred in failing to make the conclusion of law that payments of deposits between March 20, 1933 and March 28, 1933 to the defendants by the Conservator of The First National Bank and Trust Company of Yonkers were permitted payments allowed under the authority of the Proclamation of the President of March 6, 1933, the executive order of March 10, 1933 and Regulation number 10 of the Secretary of the Treasury.

62. The said court erred in failing to make the conclusion of law that the payments of deposits between March 28, 1933 and January 23, 1934 to the defendants by the

Conservator and successor Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the Proclamation of the President of March 6, 1933, the executive order of March 10, 1933 and Regulation number 10 of the Secretary of the Treasury.

63. The said court erred in failing to make the conclusion of law that the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as security for the indebtedness.

64. The said court erred in failing to make the conclusion of law that the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with The City of Yonkers as security for their deposits. 464

65. The said court erred in failing to make the conclusion of law that this action was not commenced within the time limited by law.

66. The said court erred in failing to make the conclusion of law that the defendants are prohibited by law from paying the claim alleged in the complaint.

67. The said court erred in failing to make the conclusion of law that The City of Yonkers, its officers and boards are prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the claimant and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller and shall have been audited and allowed by him. 465

68. The said court erred in failing to make the conclusion of law that The City of Yonkers, its officers and boards, are not liable in a civil action for damages or

466 *Assignments of Error and Prayer for Reversal.*

injuries to person or property or invasion of personal or property rights of any name or nature whatsoever arising at law or in equity, alleged to have been caused or sustained by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the city or any of its agents, officers or employees, unless a claim therefor, in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or on account of which the claim
467 arose, be presented to the common council and served upon the Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall be commenced thereon within one year after the happening of such accident or injury or the occurrence of such accident or injury or the occurrence of such act, omission, fault or neglect.

69. The said court erred in denying the defendant's motion to dismiss the complaint made at the end of the plaintiff's case.

70. The said court erred in striking out from the answer
468 of the defandants' witness, Stephen A. Roake, the following with respect to the deficit in the Firemen's Pension Fund for the year ending December 31st, 1933:

"A. (Continuing) December 31, 1932, the deficit was $6,790.66; $27,591.75 for 1933.

Q. What year was that? A. 1933.

Mr. Romm: What date in that year?

The Witness: December 31st.

Mr. Moore: I object. That fact was taken up by the payment, your Honor.

The Court: How is it material then, Mr. McAneny?

Mr. Moore: I move to strike out the answer, the last part of the answer, so far as it refers to the deficit in 1933.

Mr. McAneny: I am entitled to show what the City actually paid into this fund. We are now trying the case here to determine the character of this fund.

The Court: In so far as these deposits were a part of the fund in question I am receiving it. Beyond that I won't do it.

Mr. Moore: This last payment was not in our bank at all. It had nothing to do with the fund, so far as our bank was concerned. 470

The Court: How did that happen? Paid some other bank?

Mr. Moore: Paid into some other bank. Our bank closed on the 3rd of March, 1933 and they had received all their money from our bank by the 16th day of December, 1933. Now he has testified as to the deficit on December 31, 1933, which was two weeks after we paid them out. We paid them and closed up. What the deficit was in 1933——

The Court: I do not see that it is relevant here. 471

Mr. McAneny: I think it is important that you know the character of this fund. The First National Bank and Trust Company carried this as the City of Yonkers Firemen's Pension Fund. They were fully aware of the law. They could see the actual facts, how that fund has been handled by the officials of the City. It seems to me that has a bearing on the characterization of the fund.

The Court: I do not think so. I will sustain the objection.

Mr. McAneny: I take an exception."

472 *Assignments of Error and Prayer for Reversal.*

71. The said court erred in denying the defendants' motion to dismiss the complaint made at the conclusion of the whole case.

WHEREFORE, said defendants-appellants respectfully pray:

(1) That the judgment entered in said action be reversed.

(2) That judgment be entered in favor of the defendants with costs in all courts.

473

(3) That the lower court be directed to enter judgment in favor of the defendants with costs in all courts.

(4) That said defendants-appellants have such other, further or different relief as may be just.

Dated: October 28th, 1938.

LEONARD G. MCANENY,
Corporation Counsel,
474 Attorney for Defendants-Appellants.

475

Citation.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

476

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

To Walter F. Downey, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, Appellee, and Benjamin W. Moore, his attorney, Greeting: 477

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit held at Federal Courthouse, in the Borough of Manhattan, City and State of New York, within thirty days from the date hereof, pursuant to an appeal filed in the office of the United States District Court, Southern District of New York, at New York, N. Y., wherein Joseph F. Loehr, Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees

478 *Citation.*

of the Firemen's Pension Fund of the City of Yonkers are appellants and Walter F. Downey, as Receiver of the First National Bank and Trust Company of Yonkers, in liquidation is appellee, to show cause, if any there be, why the judgment entered herein on the 5th day of August, 1938, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable William Bondy, Judge of the District Court of the United States, sitting for the Southern District of New York, on this 31st day of October, 1938.

479

WM. BONDY,
U. S. D. J.

480

Notice of Appeal.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants.

L. 63-188.

To Charles Weiser, Clerk of the United States District Court, Southern District of New York.

Sir:

Notice is hereby given that Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, defendants above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on August 5, 1938.

Dated: New York, N. Y., October 31, 1938.

LEONARD G. MCANENY,
Corporation Counsel, Attorney for Defendants,
Office & P. O. Address,
City Hall,
Yonkers, New York.

484 **Stipulation and Order Extending Time to File Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

485 *against*

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

L. 63-188

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WHEREAS, an appeal was allowed the defendants herein on the 31st day of October, 1938, and

WHEREAS, the time of the said defendants to docket this case and file the transcript of record on appeal herein with the Clerk of the United States Circuit Court of Appeals for the Second Circuit will expire on November 30, 1938, now therefore,

IT IS STIPULATED AND AGREED, by and between the parties hereto that the time of the defendants to docket this case

and file the transcript of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938 and an order to this effect may be entered by either party without notice.

Dated: Yonkers, New York, November 23, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

488

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendants.

On reading and filing the foregoing stipulation, it is

ORDERED, that the time of the defendants to docket the above entitled case and file the transcript of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938.

Dated: New York, N. Y., November 23, 1938.

489

CHARLES WEISER,
Clerk, U. S. District Court,
Southern District of New York

490 **Stipulation and Order Settling Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

491 *against*

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS H. MORRISSEY, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

L. 63-188

492 IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true copy of the transcript of the record of the District Court in the above entitled matter as agreed upon by the parties.

Dated: Yonkers, New York, November 29, 1938.

BENJ. W. MOORE
Attorney for Plaintiff.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendants.

On reading the foregoing stipulation, it is

ORDERED, that the foregoing printed record be filed in lieu of the original appeal papers for the purpose of certifying a record on appeal.

Dated: New York, N. Y., December 3rd, 1938.

VINCENT L. LEIBELL.

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants.

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the printed transcript of the record of the said District Court in the above entitled matter.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York this 5th day of December, in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundredth and sixty-third year.

CHARLES WEISER,
Clerk.

(Seal)

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Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff-Appellee,

against

THE CITY OF YONKERS,

497 Defendant-Appellant.

No. 230.

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff-Appellee,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

498 Defendants-Appellants.

No. 231.

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff-Appellee,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants-Appellants.

No. 232.

499 5

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders of "The Saunders Trade School Fund",
Defendant-Appellant.

No. 233.

500 6

Before:

L. HAND, AUGUSTUS N. HAND and CHASE,
Circuit Judges.

Appeals from the United States District Court for the Southern District of New York.

From judgments in the several actions above-named that the Receiver of the First National Bank & Trust Company of Yonkers in Liquidation recover of the respective defendants therein fifty per cent. of certain moneys paid out by the Bank between March 8, 1933 and January 23, 501
1934, inclusive, on checks drawn on behalf of the various defendants, the latter appeal. Affirmed.

LEONARD G. MCANENY, Corporation Counsel, for Defendants-Appellants; LEONARD G. MCANENY, E. J. DIMOCK, MORRIS L. ROSENWASSER, J. DONALD RAWLINGS and HAROLD T. GARRITY, Counsel.

BENJAMIN W. MOORE, Attorney for Plaintiff-Appellee; BENJAMIN W. MOORE and MILTON L. ROMM, Counsel.

502 *Opinion.*

AUGUSTUS N. HAND, Circuit Judge:

The legal principles applicable to Action No. 230 against the City of Yonkers are determinative of the issues in the other three cases which need not, therefore, be separately discussed.

This is an action by the receiver of The First National Bank & Trust Company of Yonkers (herein called the Bank) against The City of Yonkers (herein called the
503 City) to recover fifty per cent. of certain money paid out by the Bank, between March 8, 1933, and January 23, 1934, inclusive, on the checks of the City. Since September 30, 1929, the Bank has been a national banking corporation organized and existing under the laws of the United States and the City a municipal corporation organized and existing by virtue of the laws of the State of New York.

On March 4, 1933 the City had funds on deposit in checking accounts in the Bank as follows:

(1) Treasurer of the City	$275,105.53
(2) City of Yonkers	1,502.84
504 (3) Nepperhan Sewer Fund of City of Yonkers	621.88

On March 4, 1933, the Governor of the State of New York proclaimed a bank holiday, and on March 6, 1933, the President of the United States proclaimed a bank holiday which was extended by further proclamation on March 9, 1933 and ratified by Congress on the latter date. The Bank never reopened for regular business after March 4, 1933 but operated under restrictions imposed by the Secretary of the Treasury until a Conservator was appointed. On March 20, 1933 the Comptroller of the Currency appointed a Conservator of the Bank and on Janu-

505 5

ary 23, 1934, appointed a receiver in liquidation. A dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 3, 1937.

On March 4, 1933, the City held various bonds having a par value of $535,000 which had been delivered to it by the Bank as security for the above three accounts, among others. These bonds, to the amount at par of $534,000, were later returned in connection with withdrawals from the accounts.

By a series of withdrawals beginning on March 8, 1933 and ending on January 23, 1934, the City withdrew almost all of the balance in each of the three accounts as follows: 506 6

1. Account with Treasurer of City		$275,105.53
Withdrawals:		
March 8 to March 19	$ 89,226.06	
March 20 to March 27	67,735.99	
March 28 on	118,016.99	
Total		274,979.04
		507 7
2. Account with City of Yonkers		$ 1,502.84
Withdrawals:		
May 23 to July 21, 1933		1,502.84
3. Account with Sewer Fund		$ 621.88
Withdrawals:		
May 4, 1933		621.88

The complainant seeks to recover fifty per cent. of the above withdrawals on the ground that they constituted an unlawful preference within Sections 91 and 194, U. S. C. A., of the National Bank Act.

If the pledge of bonds to secure the deposits was authorized by the National Bank Act it is clear that the City had a valid lien on the bonds to the extent of its deposits and this action by the receiver must fail. *Lewis* v. *Fidelity Deposit,* 292 U. S. 559; *McNair* v. *Knott,* 302 U. S. 369. It is likewise settled that national banks have no implied power to pledge assets to secure either private or public deposits, *Texas & Pac.* v. *Pottorff,* 291 U. S. 245; *Marion* v. *Sneeden,* 291 U. S. 262. Express authority for the pledge made in this case depends upon whether the requirements of the Act of June 25, 1930, 12 U. S. C. A., §90, have been met. That section provides that:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The purpose of the Act of June 25, 1930 was to equalize the positions of national and state banks in competing for deposits, and is in line with a long series of acts, beginning in 1864, designed to apply the policy of equalization. *Lewis* v. *Fidelity Co.,* 292 U. S. 559, at 564-65.

It is conceded that there was no express statutory authority in New York authorizing state banks to give security for these deposits during the times involved. In the absence of express enabling statutes state banks in New York are not authorized to pledge assets to secure either private or public deposits, and it is the duty of the

511 5

Superintendent of Banks to compel them to recover any assets so pledged upon the return of the deposits when demanded. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, at 187-88. As was said by Judge Finch in his opinion in *City of Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, 406: "No question remains that this pledge by the defendant securing the deposit (of public money) was *ultra vires* as to both parties." So far as the Act of June 25, 1930 may be thought to require an authorization of state banks to make pledges as a prerequisite for pledges by national banks it does not apply here.

512 6

But the law of New York is that pledges by state banks to secure deposits, even though *ultra vires*, may not be set aside until the deposits have been repaid in full, whether or not insolvency has intervened. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175; *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400. The parties concede that the law of New York with respect to the effect of an *ultra vires* pledge does not bring the pledges here within the Act of June 25, 1930. The policy of the statute would appear to lead to the same conclusion. The Act was designed to equalize competition for public deposits and it does not appear to give national banks authority to do what the state banks are forbidden to do and what the State Superintendent of Banks is under a duty to undo. The banks of the State could not give security in a case like this without violating their charters; Congress could not have intended to meet that type of competition. The use of the term "authorized" in the Act accords with this view; a pledge which is "*ultra vires*" cannot be said to be "authorized".

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The City argues, however, that the pledge made by the national bank in this case, even though not authorized and outside the scope of its charter powers, should be given the same effect as State law gives to similar pledges by State banks. Such a result would be contrary to the result reached in *Texas & Pac. Ry.* v. *Pottorff*, 291 U. S. 245, and

Marion v. *Sneeden*, 291 U. S. 262, in which the Court held that a national bank might recover assets which had been pledged to secure deposits even though the depositor would not be paid in full because of supervening insolvency of the bank.

The City says that these decisions are not controlling because in neither did it appear that the law of the State where the transaction occurred gave any different effect to an *ultra vires* pledge by a bank than that given under the federal law. Nevertheless both decisions make it plain, 515 that, unless the right to pledge is expressly granted by a federal statute, a pledge to secure deposits in national banks is wholly unauthorized and, as Justice Brandeis said in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 255: "To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets. • • • This policy of equal treatment was held to preclude, in case of a national bank, even the preference under §3466 of the Revised Statutes which otherwise is accorded to the United States when its debtor becomes insolvent. *Cook County* 516 *National Bank* v. *United States*, 107 U. S. 445. The effect of a pledge is to withdraw for the benefit of one depositor part of the fund to which all look for protection."

It is true that in spite of the foregoing general policy of the Act, Congress has seen fit to permit national banks to give security to depositors "of the same kind as is authorized by the law of the State", but it seems unreasonable to suppose that the general policy of the National Bank Act to prevent preferences is to be so limited as to permit hypothecations of assets that do not strictly fall within the statutory exceptions to a sound general rule requiring equal distribution of the assets of insolvent banks among all depositors. As we have already said the words

"authorized by the law of the State" plainly relate to the authority of state banks under their charters and not to the effect to be given to their *ultra vires* acts. Under the law of New York, as it existed at the time the Bank became insolvent, there can be no doubt that the pledges were unauthorized. In *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, and *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, the Court of Appeals held that enforcement of the law prohibiting pledges to secure deposits lay with the State Superintendent of Banks who, under his statutory powers, should be alert to prevent such pledges 5186
and to undo them prior to the occurrence of insolvency. The Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, evidently felt that the supervisory power of the Comptroller of the Currency was not enough to insure adequate enforcement of the policy to prevent pledges but that they should be treated by the courts as wholly void. The question of the right of a national bank to pledge its assets to secure depositors and the effect to be given to such a pledge when once made are both clearly matters of national concern. The rule in some of the states (including New York) that a bank is estopped to rescind a pledge to a depositor until he is paid in full is directly in the face of 5191
the policy attributed to the National Bank Act in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262. In this connection see *Merchants' National Bank* v. *Wehrmann*, 202 U. S. 295; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 372; *California Bank* v. *Kennedy*, 167 U. S. 362.

The rationale of the two cases cited from the New York Court of Appeals appears to be that a banking corporation organized under the laws of the State has certain actual powers outside the powers authorized by its charter and that its exercise of such *ultra vires* powers may create an estoppel not only against the corporation itself but also

against its general creditors. The measure of the powers of a national bank, on the other hand, is the statutory grant and powers not conferred by Congress are denied. The Act under which national banks are organized constitutes a complete system for their government. *Cook County Nat. Bank* v. *United States,* 107 U. S. 445, 448; *California Bank* v. *Kennedy,* 167 U. S. 362. The decision of the Supreme Court in *Texas & Pacific Ry.* v. *Pottorff,* 291 U. S. 245, 260-61, is based upon a holding that a national bank cannot exercise powers not granted so as to erect an estoppel against the general creditors for whose benefit the 521 limitation of powers was imposed. See *Concord First National Bank* v. *Hawkins,* 174 U. S. 364. If the problem here be viewed as depending upon the powers which a national bank can exercise it seems clear that the extent of its powers must be determined by an interpretation of the federal statute in the light of the policy therein expressed and that views of state courts on the powers of local corporations have no relevance except as Congress expressly makes them applicable. For the foregoing reasons the plaintiff receiver who represents the general creditors is not estopped to set aside the pledge that was made in this case.

522 The holding in *Willing* v. *Binenstock,* 302 U. S. 272, and *Scott* v. *Armstrong,* 146 U. S. 499, 510, that a setoff, allowed under the common law of a State to an insolvent bank is not objectionable as a preference, does not militate against avoiding the pledges here. The transactions in those cases were ones which the banks were authorized to make and the state law was followed because it did not conflict with the policy of the Bank Act. It is one thing to sanction a general rule of law which allows a depositor to set off his deposit against his indebtedness, it is another thing to sanction a preference based on a transaction forbidden by the Act.

While a national bank in some cases may be under a duty to return benefits it has received as the result of an *ultra vires* transaction (see *First National Bank* v. *Mott Iron Works*, 258 U. S. 240; *Citizens National Bank* v. *Appleton*, 216 U. S. 196), the rule if applicable here would not help the defendant since it would not be entitled to a preference against the other depositors of the insolvent bank in the absence of tracing a specific *res*. *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 261; *cf. Rankin* v. *Emigh*, 218 U. S. 27. It is well settled that the distribution of the assets of an insolvent national bank is governed by federal law and that state laws which attempt to create preferences which arise at the time of insolvency are to be disregarded. *Old Company's Lehigh, Inc.* v. *Meeker*, 294 U. S. 227; *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216; *Davis* v. *Elmire Savings Bank*, 161 U. S. 275.

The City claims that the payments to it prior to the Conservatorship were not made "after the commission of an act of insolvency, or in contemplation thereof * * * with a view to the preference of one creditor to another * * *". The Bank was closed from March 4, 1933 to March 6, 1933 under proclamations by the Governor of New York and the President of the United States. Later it was permitted to operate under restrictions imposed by the Secretary of the Treasury. On March 20 a Conservator was appointed with the powers of a receiver as provided in 12 U. S. C. A., §203. On January 23, 1934, the Comptroller of the Currency on a finding of insolvency appointed a receiver. The Bank never opened for regular business after March 4, 1933. No attempt was made by the appellants to show any change in the Bank's condition after March 4, 1933. We hold that the facts indicated that the Bank would not be able to pay its depositors in due course and the trial court could properly draw the inference that the pay-

ments were in violation of 12 U. S. C. A., §91. See *Dehne* v. *Mine Safety Appliance Co.*, 94 F. (2d) 956 (C. C. A. 3); *cf. Kullman* v. *Wooley*, 83 F. (2d) 129 (C. C. A. 5); *Willing* v. *Eveloff*, 94 F. (2d) 344 (C. C. A. 3); *Hardee* v. *Washington Loan & Trust Co.*, 91 F. (2d) 314 (App. D. C.).

The payments made by the Conservator were recoverable on still another theory because made out of the assets of an insolvent under a mistake of law. *LaParr* v. *City of Rockford, Ill.*, 100 F. (2d) 564 (C. C. A. 7); *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 152 (App. D. C.), aff'd. 297 U. S. 527 383. For the foregoing reasons the judgments in the four cases on appeal are affirmed.

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Order for Mandate.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of August, one thousand nine hundred and thirty-nine.

Present:

530 6

Hon. LEARNED HAND,
Hon. AUGUSTUS N. HAND,
Hon. HARRIE B. CHASE,
Circuit Judges.

WALTER F. DOWNEY, Receiver, etc.,
Plaintiff-Appellee,

vs.

JOSEPH F. LOEHR, Mayor, *et al.*,
Defendant-Appellant.

No. 232.

531 7

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

IT IS FURTHER ORDERED that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver, etc.,

vs.

JOSEPH F. LOEHR, Mayor, *et al.*,

ORDER FOR MANDATE.

United States Circuit of Appeals,
Second Circuit,
Filed Aug. 22, 1939,
D. E. ROBERTS, Clerk.

535

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 178, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

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WALTER F. DOWNEY, Receiver, etc.,

Plaintiff-Appellee,

against

JOSEPH F. LOEHR, Mayor, etc., *et al.*,

Defendants-Appellants.

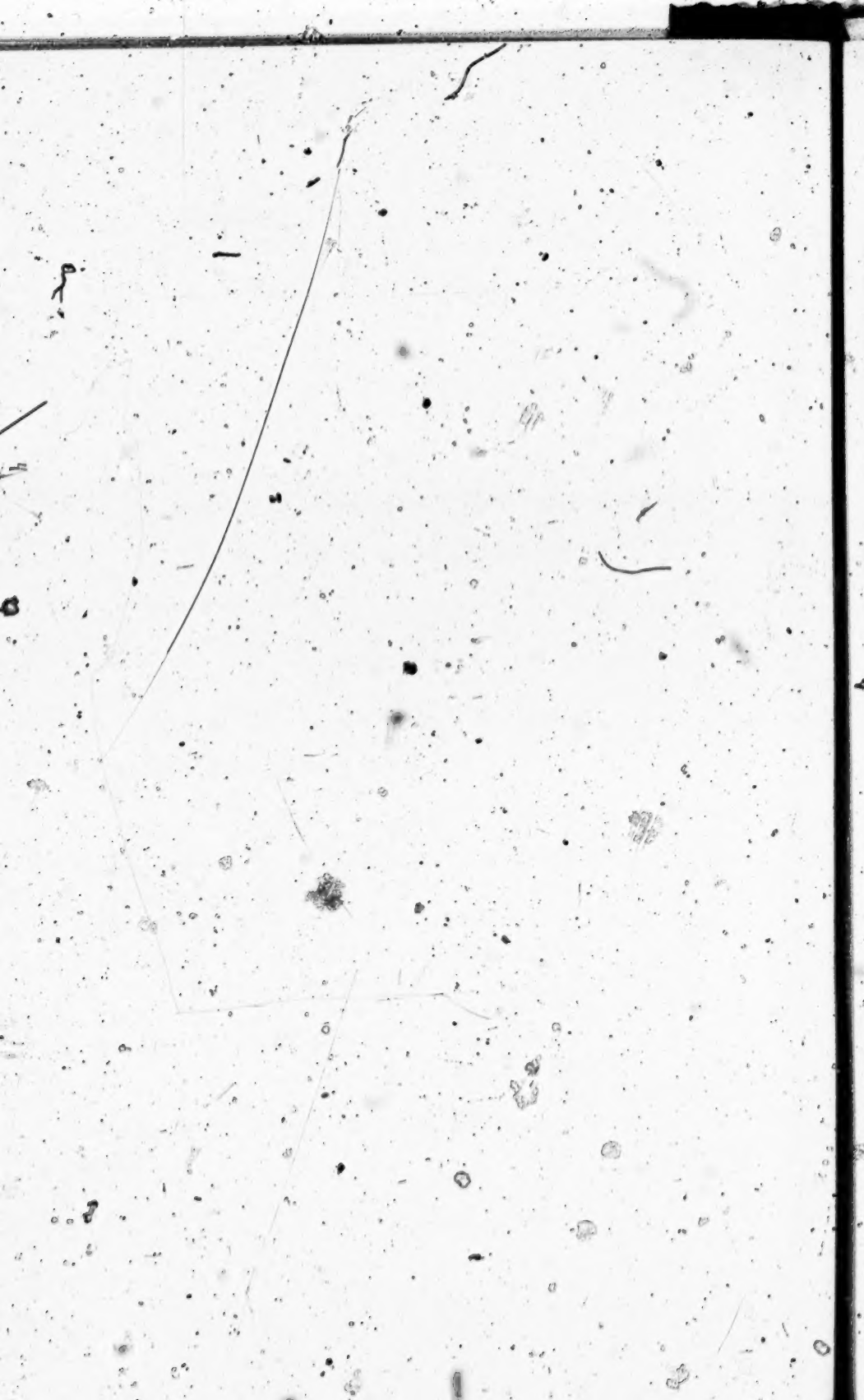
as the same remain of record and on file in my office.

537

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighteenth day of September, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-fourth.

[SEAL]

D. E. ROBERTS,
Clerk.



SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5715)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 545

THE CITY OF YONKERS, AS TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF IRVIN SAUNDERS, OF "THE SAUNDERS TRADE SCHOOL FUND", PETITIONER,

vs.

WALTER F. DOWNEY, AS RECEIVERS OF THE FIRST NATIONAL BANK AND TRUST COMPANY OF YONKERS, NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1939.

CERTIORARI GRANTED DECEMBER 18, 1939.

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TESTIMONY.

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Walter F. Downey,
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Cross 22

John B. Power,
Direct 23
Cross 25

Carl H. Vanvick,
Direct 27

DEFENDANT'S WITNESSES:

Stephen A. Roake,
Direct 38

Gustave W. Klein, Jr.,
Direct 44
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Re-direct 47
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	Offered at Page	Printed at Page
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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,

Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

Statement Under Rule 13.

This is an appeal by the defendant above named from a judgment made and entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 5th day of August, 1938, in the above entitled case, in favor of the plaintiff, Walter F. Downey, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, against the defendant, The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund" in the sum of $2,485.69, together with interest thereon in the sum of $382.93 and costs in the sum of $50.93.

This action was commenced on April 23, 1936, by the original plaintiff herein, Arthur E. Muth, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, by the filing of a praecipe and the issuance of a summons. The summons and complaint, with proof of ser-

Statement Under Rule 13.

vice, were filed on May 2, 1936. The defendant filed an answer on July 21, 1936, which was amended by stipulation dated November 24, 1937. Walter F. Downey, having been appointed Receiver of the First National Bank and Trust Company in the place of Arthur E. Muth on November 15, 1937, he was by an order dated November 26, 1937, substituted as plaintiff in the place and stead of said Arthur E. Muth.

On January 5, 1938, this case was tried before Judge John Knight without a jury, a jury having been waived by stipulation on the record. Judge Knight reserved decision.

On June 8, 1938, Judge Knight rendered his decision in favor of the plaintiff.

On July 18, 1938, findings of fact and conclusions of law, as requested by the plaintiff, were signed by Judge Knight and on the same day Judge Knight signed a memorandum containing his rulings upon the defendant's requests for findings of fact and conclusions of law. The findings and memorandum were filed on or about July 29, 1938.

On August 3, 1938, costs were taxed in the sum of $50.93 and on August 5, 1938, judgment was entered by the plaintiff against the defendant in the sum of $2,485.69, together with interest thereon in the sum of $382.93.

Thereafter defendant made a motion to determine the applicability of the new Rules of Civil Procedure for guidance on the appeal herein. Judge Knight determined under Rule 86 that the application of the new rules would not be feasible and would work injustice in this case. Accordingly the former practice has been followed herein except that in addition appeal was taken under the new procedure out of abundant caution.

On October 31, 1938, an appeal allowed defendant from the said judgment of August 5, 1938.

There was no arrest, attachment or reference herein.

Plaintiff has appeared through the proceedings in the above entitled action by Benjamin W. Moore, Esq., and the defendant has appeared by Leonard G. McAneny, Esq., Corporation Counsel of the City of Yonkers.

Docket Entries.

4/23/36	Filed Praecipe and issued summons.
5/ 2/36	Filed summons and complaint and affidavit of service 5/1/36.
7/21/36	Filed stipulation extending time to answer to 7/23/36.
7/21/36	Filed answer of Defendant City of Yonkers.
11/20/37	Filed note of issue. Motion to substitute party plaintiff. Returned 11/26/37.
11/26/37	Filed affidavit and notice of motion to substitute Receiver as party plaintiff. No opposition. Motion granted, Mandelbaum, J.
11/26/37	Filed order substituting Receiver as party plaintiff, Mandelbaum, J.
1/ 5/38	Before Knight, J. Trial began. Jury waived by stipulation. Concluded. Decisions reserved.
6/13/38	Filed opinion No. 11465. Plaintiff to recover $2,485.69, Knight, J.
7/29/38	Filed finding of fact and conclusions of law, Knight, J.
7/29/38	Filed Defendant's request for findings and conclusions.
7/29/38	Filed opinion No. 11,596 on Defendant's request for findings and conclusions, Knight, J.

Docket Entries.

	8/ 3/38	Filed bill of costs taxed at $50.93.
	8/ 5/38	Filed Judgment No. 38413 for plaintiff for $2,919.55.
	9/26/38	Filed note of issue. Motion to determine. Civil Rules 46 and 37. Returned 10/4/38.
	10/22/38	Filed affidavit and notice of motion to determine. Civil Rules 46 and 73.
	10/22/38	Filed affidavit in opposition to motion to determine. Civil Rules 46 and 73.
11	10/22/38	Filed order denying motion to determine. Civil Rules 46 and 73.
	10/28/38	Filed order extending time to file bill of exceptions to 1/7/39, Conger, J.
	10/29/38	Filed exceptions, Knight, J.
	10/31/38	Filed petition and order allowing appeal, Bondy, J.
	10/31/38	Filed Assignment of Errors.
	10/31/38	Filed cost bond on appeal Great American Indemnity Co.
12	11/ 1/38	Filed notice of appeal and mailed copy to Benjamin W. Moore, 11/2/38.
	11/ 3/38	Filed citation—Ret. 30 days.
	11/22/38	Filed bill of exceptions and settlement of same (Knight).

Summons.

13

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, as Receiver of The First National Bank and Trust Company of Yonkers, New York,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund".

L. 64, Page 75.

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To the Above-Named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

15

WITNESS, the Honorable JOHN C. KNOX, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 23rd day of April, A. D. 1936.

CHARLES WEISER,
Clerk.

(SEAL)

BENJAMIN W. MOORE,
Plaintiff's Attorney.
Office and Post Office Address:
30 South Broadway, Yonkers,
New York.

16

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

against

17

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

Plaintiff complaining of the defendant, by his attorney, Benjamin W. Moore, alleges:

First.—That at all times since the 30th day of September, 1929 the First National Bank and Trust Company of
18 Yonkers has been a national banking corporation organized and existing under the laws of the United States with its principal place of business in the City of Yonkers, County of Westchester and State of New York.

Second.—That the defendant was at all times hereinafter mentioned and now is a municipal corporation duly organized and existing under the Laws of the State of New York, and that the defendant was at all times hereinafter mentioned and now is the duly acting trustee of "The Saunders Trade School Fund" having been appointed

thereto under the last Will and Testament of Irvin Saunders, deceased.

Third.—That on the 4th day of March, 1933 said First National Bank and Trust Company of Yonkers, New York suspended all transactions and business and thereafter never reopened in the regular course of business, and that on the 20th day of March, 1933 the Comptroller of the Currency of the United States acting under and pursuant to the Bank Conservation Act enacted by the Congress of the United States on March 9, 1933 duly appointed Percival W. Trudeau as Conservator of said First National Bank and Trust Company of Yonkers, and said Conservator, under the direction of said Comptroller, on said March 20, 1933, duly took possession of the books, records and assets of every description of said First National Bank and Trust Company of Yonkers, New York and continued to act as such Conservator until July 24, 1933: that Louis D. Rossire was on said July 24, 1933, by like authority, duly appointed by said Comptroller of the Currency as successor Conservator of said First National Bank and Trust Company of Yonkers, New York, in the place and stead of said Percival W. Trudeau; and that said Louis D. Rossire duly qualified as such Conservator and continued to act as such until the 23rd day of January, 1934: that the said Comptroller of the Currency had become satisfied of the insolvency of said First National Bank and Trust Company of Yonkers, New York and that the plaintiff was on that day duly appointed by said Comptroller of the Currency as Receiver of the said First National Bank and Trust Company of Yonkers, New York to liquidate said bank as of the said 4th day of March, 1933, and that the plaintiff has duly qualified and is now acting as such Receiver.

Fourth.—Upon information and belief that from the said 30th day of September, 1929 the defendant has main-

tained certain of the funds of "The Saunders Trade School Fund" in a deposit account in said Bank under the caption "Saunders Trade School Trustees Fund Account" and on the said 4th day of March, 1933 the credit balance of said deposit account, together with accrued interest computed to the said 4th day of March, 1933, amounted to the sum of $4,971.38.

Fifth.—Upon information and belief that from the said 30th day of September, 1929, and on divers dates during the existence of said deposit account, maintained as aforesaid by the defendant, said First National Bank and Trust Company of Yonkers, New York pledged with and to the defendant, as security for the repayment of the indebtedness evidenced by said deposit account and as security for the repayment of the indebtedness evidenced by certain other deposit accounts, certain of the assets of the said Bank consisting of various and sundry bonds, a schedule of which is attached hereto, marked Exhibit A, and made a part of this complaint, and that the pledge of assets so made to secure the repayment of the indebtedness evidenced by the deposit account maintained as aforesaid by the defendant was unlawful, illegal, *ultra vires*, null and void.

Sixth.—Upon information and belief that on divers dates from the said 20th day of March, 1933 to or about the 16th day of December, 1933 all of the aforesaid assets so pledged with the defendant were recovered from the defendant by payments on account of all the aforesaid deposit accounts and on the 4th day of May, 1933 the deposit account maintained as aforesaid by the defendant was paid out in full.

Seventh.—That under date of December 16, 1933 there was made available to all creditors of the said Bank a first

dividend of 40% of the amount of their deposits at the time of the Bank's suspension.

Eighth.—That the said payment referred to in paragraph marked "Sixth" of this complaint on account of the deposit account maintained by the defendant as aforesaid were not ratable with and proportionate to the said dividend made available to the other creditors of the said Bank and was unlawful, illegal, *ultra vires,* null and void.

Ninth.—That there is now justly due and owing from the defendant to the paintiff the sum of $2,982.83 representing the difference between the said 40% dividend and the said payment totalling $4,971.38.

Tenth.—That no part of said sum has been paid although payment thereof has been duly demanded.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of $2,982.83, with interest thereon from the 4th day of May, 1933, besides the costs and disbursements of this action.

BENJAMIN W. MOORE,
Attorney for Plaintiff,
Office & P. O. Address:
30 South Broadway,
Yonkers, New York.

Schedule A, Annexed to Complaint.

Description of Assets Pledged	Face Value
Fourth 4½ Liberty Loan Bonds	$ 40,000.00
Town of Cortlandt, New York	37,000.00
City of New York, Corp. Stock	10,000.00
Town of Tonawanda, Sewer Bonds	45,000.00
City of Yonkers, School Bonds	10,000.00
United States Fourth Liberty Loan Bonds, 4¼	15,000.00
State of Arkansas, 4½s, due 1942	50,000.00
Butte, Montana, 6s, due 1941	15,000.00
Charlotte, North Carolina, 4½s, due 1934	5,000.00
Galveston, Texas, 5s, due 1933-1935	12,000.00
Town of Greenburgh, New York, 4½s, due 1946	15,000.00
Town of Greenburgh, New York, 4½s, due 1953	5,000.00
Town of Greenburgh, New York, 4½s, due 1954	1,000.00
Town of Huntington, Long Island, 4½s, due 1938	2,000.00
Town of Huntington, Long Island, 4½s, due 1945	2,000.00
Town of Huntington, Long Island, 4½s, due 1946	7,000.00
County of Jefferson, Alabama, 5s, due 1947	15,000.00
State of Louisiana, 4¾s, 1973	10,000.00
State of Louisiana, 4½s, due 1953	5,000.00
New Orleans, 4½s, due 1956	5,000.00
City of New York, 4½s, due 1965	10,000.00
Norfolk, Virginia, 4½s, due 1935	10,000.00
Norfolk, Virginia, 4½s, due 1935	15,000.00
State of Oregon, 5½s, due 1937	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1945	2,500.00

Schedule A, Annexed to Complaint. 31

State of Oregon, 5½s, due 1945	$ 2,500.00
State of Oregon, 5½s, due 1946	2,500.00
City of Orlando, Florida, 5½s, due 1952	25,000.00
Portsmouth, Virginia, 5s, due 1954	10,000.00
City and County of San Francisco, 5s, due 1945	10,000.00
Village of Sea Cliff, New York, 5s, due 1933	1,000.00
State of South Dakota, 5s, due 1938	15,000.00
Winston-Salem, North Carolina, 4¾s, due 1936	14,000.00
Canadian, Int. Paper, 6s, due 1949	25,000.00
Comm. of Kentucky, 4½s, due 1950	50,000.00
Town of Lyndhurst, 5½s, due 1934	55,000.00
State of New Mexico, 6s, due 1935	25,000.00
Bay City, 4s, due 1935	3,000.00
Seattle, Washington, 5s, due 1934	6,000.00
Seattle, Washington, 5s, due 1940	2,000.00
Teaneck, New Jersey, 4½s, due 1934	25,000.00
Union, 6s, due 1934	25,000.00
Ohio Public Service, 6s, due 1953	30,000.00
South Bay Cons. Water Co. 5s, due 1950	10,000.00
Laclede Gas Light Co. 5½s, due 1935	5,000.00
Total Face Value	$692,000.00

32

33

(Duly verified by Arthur E. Muth on May 1, 1936.)

34

Answer as Amended by Stipulation, Dated November 24, 1937.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

35 *against*

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64, Page 75.

Defendant, by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, for its answer to the plaintiff's complaint:

36

First.—Denies each a d every allegation of said complaint in paragraphs numbered "Eighth," "Ninth" and "Tenth."

Second.—Denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs of said complaint numbered "Third" and "Seventh."

Third.—Denies each and every allegation of said complaint in paragraph numbered "Fifth," in so far as it is alleged that the pledge of assets made to secure the repay-

37

ment of the indebtedness evidenced by the deposit account maintained by the City of Yonkers was unlawful, illegal, ultra vires, null and void. Further denies that the schedule as set forth and marked Exhibit A is a correct list of the securities pledged with the City of Yonkers on or about the 4th day of March, 1933, in that the following bonds on or about that day, as listed in Exhibit A, were not in possession of the said City:

Fourth 4½ Liberty Loan Bonds	$40,000.00
Town of Cortland, New York	37,000.00
City of New York, Corp. Stock	10,000.00
Town of Tonawanda, Sewer Bonds	45,000.00
City of Yonkers, School Bonds	10,000.00
United States Fourth Liberty Loan Bonds, 4½%	15,000.00

38

As a first, separate and complete defense, the defendant further alleges:

Fourth.—That upon information and belief, that on or before the 4th day of March, 1933, the First National Bank and Trust Company of Yonkers had the authority to pledge its assets to secure public money in the State of New York.

39

Fourth-A: Denies each and every allegation contained in the paragraph of the Complaint numbered "Sixth."

Fifth.—That prior to the 3rd day of March, 1933, the said First National Bank and Trust Company of Yonkers pledged certain securities with the City of Yonkers as security for the repayment of its deposits by the said bank, as more clearly shown by plaintiff's "Exhibit A," except as hereinbefore denied.

40 *Answer as Amended by Stipulation, Dated November 24, 1937.*

Sixth.—That the said deposit of the City of Yonkers was a public fund of the said City.

As a second, separate and complete defense, the defendant further alleges:

Seventh.—Upon information and belief, that on or about the 4th day of March, 1933, the City of Yonkers held as security for its deposits negotiable bonds in the sum of
41 $535,000.00, of the First National Bank and Trust Company of Yonkers.

Eighth.—That, upon information and belief, there was on deposit on the 4th day of March, 1933, to the credit of the City of Yonkers, as Trustee of the Saunders Trade School Fund, the sum of $4,971.32.

Ninth.—That, upon information and belief, prior to the 2nd day of May, 1933, Percival W. Trudeau, as Conservator of the First National Bank and Trust Company of Yonkers, voluntarily released all moneys of the said City of Yonkers to the said City.
42

Tenth.—That, upon information and belief, the said release of said City's deposits was made pursuant to instructions of the Comptroller of Currency of the United States or his deputies.

Eleventh.—That, upon information and belief, said City deposits were released only after an opinion was given to the Conservator, Percival W. Trudeau, by his attorney.

Twelfth.—That the said City of Yonkers, relying upon the voluntary return of all moneys of the said City, sur-

43

rendered to the Conservator of the First National Bank and Trust Company of Yonkers the aforesaid securities in the sum of $535,000.00.

Thirteenth.—That the said payment by the Conservator and his successor was voluntary and without duress or fraud and cannot be recovered back.

Fourteenth.—That in consideration for the return of all moneys of the said City of Yonkers, the said City returned to the Conservator of the First National Bank and Trust Company bonds owned by the said Bank in the sum of $535,000.00 and were returned to the said Bank in full satisfaction and discharge of any claim of the plaintiff in the complaint mentioned and in view of all demands to that date.

44

As a third, separate and complete defense, the defendant further alleges:

Fifteenth.—That on or about the 2nd day of May, 1933, Percival W. Trudeau, as Conservator of the First National Bank and Trust Company of Yonkers, in consideration of the return of securities held by the City of Yonkers in the sum of $535,000.00, released the deposits of the said City of Yonkers, and that the said release of the deposits constituted a release of the defendant of and from all liability to the plaintiff for any and all claims of the plaintiff, Bank, against the defendant, City of Yonkers, including the alleged cause of action set forth in the complaint and against any and all claims in regard to said deposit which might thereafter arise against the defendant for and on account of anything done by the defendant prior to the date of the release of said moneys.

45

46 *Answer as Amended by Stipulation, Dated November 24, 1937.*

As a fourth, separate and complete defense, the defendant further alleges:

Sixteenth.—That the aforesaid payments to the City of Yonkers of its deposits were voluntary payments, and at the time of said payments, the First National Bank and Trust Company of Yonkers was not insolvent.

47 *As a fifth, separate and complete defense, the defendant further alleges:*

Seventeenth.—That the defendant, City of Yonkers, was appointed Trustee of the Saunders Trade School fund by a Will of Irvin Saunders, deceased, admitted to probate in the Surrogate's Court of Westchester County on the 19th day of March, 1909.

Eighteenth.—Upon information and belief, that pursuant to said Will, the proceeds of the income from Saunders Trade School Fund was to be used for the erection and maintenance of a trade school in the City of Yonkers, New
48 York.

Nineteenth.—On the 19th day of October, 1923, the Honorable Joseph Morschauser, Justice of the Supreme Court, Ninth Judicial District, duly made an order providing that all revenues from the said Saunders Trade School Fund should be paid over to the City of Yonkers and that the maintenance of said Saunders Trade School should be included in the annual estimate of revenues and expenditures of the said City of Yonkers, more fully shown by Defendant's Exhibit A, which is attached hereto and made a part hereof.

Answer as Amended by Stipulation, Dated November 24, 1937.

Twentieth.—That all moneys on deposit in the said First National Bank and Trust Company on March 4, 1933, were funds of the City of Yonkers and public moneys.

WHEREFORE, defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

LEONARD G. McANENY,
Corporation Counsel,
Attorney for Defendant,
Office and Post Office Address:
City Hall,
Yonkers, New York.

Defendant's Exhibit A, Annexed to Answer.

(Same as Defendant's Exhibit B, printed at pages 63 to 66.)

(Duly verified by James E. Hushion on July 21, 1936.)

52

Bill of Exceptions.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, in Liquidation,

Plaintiff,

53 *against*

CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

L. 64-75.

BE IT REMEMBERED, that at a stated Term of the District Court of the United States for the Southern District of New York, on January 4, 1938, before the Honorable John Knight, United States District Judge for the Western District of New York, then sitting in and for the Southern District of New York, presiding, the following proceedings were had:

54

Appearances:

BENJAMIN W. MOORE, Esq., and MILTON L. ROMM, Esq., Attorneys and Counsel for Plaintiff.

LEONARD G. MCANENY, Esq., Corporation Counsel of the City of Yonkers, MORRIS ROSENWASSER, Esq., First Assistant Corporation Counsel, and HAROLD T. GARRITY, Esq., Assistant Corporation Counsel, Attorneys and Counsel for Defendant.

55

Mr. Moore: The jury in this case is waived.

The Court: The stenographer will note the stipulation then.

WALTER F. DOWNEY, the plaintiff herein, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Q. I pass you a paper, Mr. Downey, and ask you if you can identify that paper (handing)? 56

Mr. McAneny: The answer is yes or no.

A. Yes.

Mr. Moore: I ask to have the paper marked for identification.

(Marked Plaintiff's Exhibit 1 for identification.)

Mr. McAneny: May I see that?

Mr. Moore: Yes (handing). I am going to offer this in evidence. It is the appointment of Mr. Trudeau.

57

Mr. McAneny: I object to a statement as to what this is, and I object to it on the ground that it is incompetent, irrelevant and immaterial and not binding upon the defendant in this action. The question of insolvency is a question of fact, and without production of evidence of insolvency that this certificate which is now being offered has no force or effect upon the defendant in this action. I think it is not properly presented in view of the fact that the person purported to be appointed is not produced in court for examination and cross examination. That is not binding upon this defendant.

58 *Walter F. Downey, Plaintiff—Direct.*

Mr. Moore: In our complaint we allege that the First National Bank and Trust Company of Yonkers suspended all transactions on March 4, 1933, for the transaction of business and thereafter it never reopened in the regular course of business until on the 20th day of March the Comptroller of Currency of the United States, acting under and pursuant to the Bank Conservation Act enacted by the Congress of the United States, on March 9th duly appointed Percival W. Trudeau a Conservator of said First National Bank and Trust Company of Yonkers. That
59 is denied in the answer. I am offering this as proof of Mr. Trudeau's appointment.

The Court: Objection overruled.

Mr. McAneny: I take an exception. It seems to me where an allegation is made that an individual who is now alive and can be produced is assuming a legal position with respect to the plaintiff that that person should be produced if there is going to be any probity to the position he has taken in this case.

As far as the National Banking Act is concerned, that Act in itself or any action taken under that Act
60 does not as a matter of fact establish insolvency with respect to any national bank or any other institution upon which such a certificate is issued; and therefore that this evidence now offered is not the best evidence and is not the proper evidence and is not in any sense binding upon these defendants.

The Court: Objection overruled; exception to the defendant.

Mr. McAneny: Exception.

Mr. Moore: I offer it in evidence.

(Plaintiff's Exhibit No. 1 for identification received in evidence.)

Mr. Moore: I ask to hand this paper to the witness.

Q. Can you identify that paper, Mr. Downey? A. Yes.

Mr. Moore: May I have that marked for identification.

(Marked Plaintiff's Exhibit No. 2 for identification.)

Mr. Moore: I offer this in evidence (handing to Mr. McAneny). 62

Mr. McAneny: I object to the introduction of these documents.

Mr. Moore: I offer this in evidence. It is the appointment of Mr. Rossire as second Conservator, a certified copy of it.

Mr. McAneny: I offer the same objection to the introduction of this document in evidence or to its consideration in the case as I did to Plaintiff's Exhibit 1. I think it constitutes no evidence of insolvency of this institution.

The Court: Objection overruled.

Mr. McAneny: Exception. 63

(Plaintiff's Exhibit No. 2 for identification received in evidence.)

Q. I show you another paper, Mr. Downey, and ask you if you can identify that paper? A. Yes.

Mr. Moore: May I have that marked for identification?

(Marked Plaintiff's Exhibit No. 3 for identification.)

64 *Walter F. Downey, Plaintiff—Cross.*

Mr. Moore: I offer in evidence certified copy of the January 23, 1934 appointment of Arthur E. Muth.

(Plaintiff's Exhibit No. 3 for identification received in evidence.)

Mr. McAneny: I do not object to that, but that was an action that took place after the transactions involved in this case are concerned.

Mr. Moore: I offer in evidence a certified copy of the appointment of Walter F. Downey as Successor Receiver to Arthur E. Muth. It is dated the
65 15th day of November, 1937. Any objection?

Mr. McAneny: No, I do not object to that.

(Marked Plaintiff's Exhibit No. 4.)

Q. Mr. Downey, have you qualified as Receiver of the First National Bank and Trust Company of Yonkers, New York? A. Yes.

Q. You are now acting as such Receiver? A. Yes.

Q. Are you in charge of the liquidation of the bank? A. Yes.

Q. Was the first dividend of 40 per cent made available
66 to the general depositors on December 16, 1933? A. Yes.

Q. Was a second dividend of 10 per cent made available to the general depositors on November 3, 1937? A. Yes.

Mr. Moore: You may examine.

Cross examination by Mr. McAneny:

Q. When did you first become connected with the bank? A. At the close of business November 15, 1937.

Q. The statements that you have made in this case are not based upon your personal knowledge, are they? A. Just what do you mean, Mr. McAneny?

Q. I mean to say that they do not come under your observation in any sense as an official of the bank?

Mr. Moore: You mean as to the two dividends?

Mr. McAneny: Yes.

Mr. Moore: He is the liquidator of the bank. He has qualified as receiver.

Mr. McAneny: I am asking him a question as to the circumstances.

Q. In other words, this statement was made from records which you have examined after you were appointed 68
receiver? A. Relative to the two dividends, Mr. McAneny?

Q. Yes. A. Yes, and correspondence.

Q. That is correct? A. Yes, sir.

Mr. McAneny: All right. That is all.

Mr. Moore: That is all.

(Witness excused.)

John B. Power, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows: 69

Direct examination by Mr. Moore:

Q. Mr. Power, what is your present employment? A. Clerk in the employ of the Receiver of the First National Bank and Trust Company of Yonkers, New York, in Liquidation.

Q. Were you an employee of the First National Bank and Trust Company of Yonkers? A. Yes.

Q. For how long? A. Since April 1, 1929.

Q. What position did you hold there? A. Assistant cashier.

70 *John B. Power, for Plaintiff—Direct.*

Q. Did you continue in the employment of the Conservators and of the Receivers? A. Yes.

Q. Do you recall March 4, 1933? A. Yes.

Q. What day of the week was that? A. Saturday.

Q. Was the bank open for any kind of business on that day? A. No.

Mr. Moore: I am going to offer in evidence these two proclamations of the Governor. I offer in evidence in this case two proclamations of the Governor, one dated March 4th and one dated March 6th,
71 1933.

(Marked Plaintiff's Exhibits Nos. 5 and 6.)

Mr. Moore: May I see the Saunders Trade School ledger?

Q. Mr. Power, I show you a book. Can you identify that book? A. Yes.

Q. What have you there? A. This is the deposit account of The Saunders Trade School, Trustee Fund Account.

Mr. Moore: I want to have that marked for identification.

72

(Marked Plaintiff's Exhibit No. 7 for identification.)

By the Court:

Q. What page is that? A. It has no page number.

Q. What is the page? A. It has no page number.

By Mr. Moore:

Q. Was Plaintiff's Exhibit 7 marked for identification records made in the regular course of the bank's business? A. Yes.

John B. Power, for Plaintiff—Cross. 73

Q. Was it the regular course of the bank's business to have those records made on the day when the transaction described in them occurred? A. Yes.

Mr. Moore: I offer this in evidence.

Mr. McAneny: May I cross examine him on that?

Mr. Moore: Yes, you can cross examine on it. Is there any objection to that going into evidence?

Mr. McAneny: No.

(Plaintiff's Exhibit No. 7 for identification received in evidence.)

74

Mr. Moore: That is all.

Cross examination by Mr. McAneny:

Q. How was that account headed in the ledger, Mr. Power? A. Just a second. Saunders Trade School Trustee's Fund Account.

Q. How many debit items are there? A. Since what period?

Q. During the period of the book that was put in evidence.

Mr. Moore: March 3rd.

75

A. One debit item.

Q. Was that debit entry made from this check that I now show you? A. Yes.

Q. How is that check signed? A. It is signed "James J. Hushion, Comptroller; G. W. Klein, Jr., Treasurer." The check is imprinted "Saunders Trade School Trustee Fund Account."

Q. Where? A. On the side of the check.

Q. That is not over their signature? A. No.

Q. Do you know the signatures of those two gentlemen? A. Yes.

76 *John B. Power, for Plaintiff—Cross.*

Q. Mr. Hushion and Mr. Klein? A. Yes.

Q. Those are their signatures? A. Yes.

Q. What does that check indicate on the reverse side as to when it was paid? A. When it was paid?

Q. By the bank, yes. A. May 4, 1933.

Q. Can you tell us to whom that check is made out? A. Saunders Trade School Fund.

Q. It was made to the Saunders Trade School Fund itself? A. Yes.

Q. That was really a transfer, was it not? A. Yes.

77 Q. Does it show where that was deposited? A. Yes.

Q. What does it show? A. Central National Bank of Yonkers.

Mr. Moore: I object to that as incompetent, irrelevant and immaterial, and move to strike out the answer.

The Court: Overruled.

Mr. Moore: Exception.

The Court: It appears from the check itself.

78 Q. How long have you been connected with the First National Bank and Trust Company? A. Since October 1, 1929.

Q. Prior to that by whom were you employed? A. First National Bank of Yonkers.

Q. Your employment continued there after the merger of the bank; is that correct? A. Yes.

Mr. McAneny: That is all.

Mr. Moore: That is all.

(Witness excused.)

CARL H. VANVICK, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Q. Mr. Vanvick, are you employed by Walter F. Downey as Receiver of the First National Bank and Trust Company of Yonkers? A. Yes, sir.

Q. In what capacity? A. Auditor in charge of the books and records and matters pertaining to the claims.

Q. How long have you been the auditor in the receivership? A. Since April 16, 1934. 80

Q. Are you familiar with the ledgers and records of the bank? A. Yes.

Q. Do the bank records show a deposit account maintained under the caption "Saunders Trade Institution" since September 30, 1929? Have you the 1929 books there? A. No.

Q. Do the records show an account in the name of the Saunders Trade School Fund in March, 1933, March 3, 1933? A. Yes; "Saunders Trade School Trustee Fund Account."

Q. Was that account an interest-bearing account? A. Yes. 81

Q. What was the balance together with the accrued interest at the close of business on March 3, 1933? A. $4,971.38.

Mr. McAneny: You might change that question to conform to my previous objections.

Q. As of March 3, 1933. I am leaving out "at the close of business on that day."

The Court: What does it show? What is the balance?

The Witness: $4,971.38.

82 *Carl H. Vanvick, for Plaintiff—Direct.*

Q. When did the first withdrawal from the account occur after March 3, 1933? A. May 4, 1933.

Q. How much was withdrawn from the account on that date? A. $4,971.38.

Q. What is the interest due on the withdrawal?

Mr. McAneny: I object to that question, "What is the interest due," on the ground——

The Court: He may state the amount of interest.

Q. On that account what is the amount of interest due
83 down to date?

Mr. McAneny: That he computes.

Q. (Continuing) Yes. Computed as you compute it? A. $904.42.

Mr. McAneny: It is understood that the question is what is the amount of interest as you compute it; is that so?

Mr. Moore: Yes.

Q. Will you tell us on what basis you calculate the interest? A. Interest at 6 per cent on $4,971.38 from May 4,
84 1933 to December 16, 1933; then interest on 60 per cent or $2,982.83 from December 16, 1933 to November 3, 1937; then interest on 50 per cent or $2,485.69 from November 3, 1937 to January 3, 1938.

Q. What is the total amount of the interest computed, as you have computed it? A. $904.42.

Mr. Moore: That is all.

Mr. McAneny: No questions.

Mr. Moore: Plaintiff rests.

The Court: What is the amount you show——

Mr. Moore: The amount?

85

The Court: It shows the amount deposited and the amount withdrawn.

By Mr. Moore:

Q. What is the amount due on the account as you figure it out? Can you give that? A. $2,485.69.

The Court: I do not see how you make that computation. You said there was a balance on May 3, 1933 of $4,971.38; May 4th that same amount was withdrawn.

86

Q. Will you tell us how you figure it?

The Court: How do you make that $904?

Q. Tell us how you figured it out again.

The Court: Unless my figures are wrong.

A. Interest of $904.42 was arrived at by the——

The Court: I understand that. You have explained how it is arrived at. What I want to know is what the balance in that account was?

87

The Witness: On March 3, 1933?

The Court: $4,971.38.

The Witness: That is right.

The Court: That was withdrawn?

The Witness: Yes.

The Court: It was paid, $4,971.38, the full amount, back to the City?

The Witness: Yes.

The Court: In May, 1933, the interest computation is $904.42.

The Witness: It is based upon the dividends that were declared.

88 *Motion to Dismiss the Complaint.*

The Court: 40 and 10 per cent?

The Witness: 40 per cent on December 16, 1933, and 10 per cent on November 3, 1937.

The Court: The amount claimed would be half of the $4,971.38, plus the interest?

Mr. Moore: Plus the interest, that is correct.

Q. That is the way you figured it, Mr. Vanvick? A. Yes.

Mr. Moore: Plaintiff rests.

Mr. McAneny: I move to dismiss the complaint
89 on the ground that the plaintiff has set forth and proved no facts sufficient to constitute a cause of action in this proceeding. There was absolutely no proof of insolvency. Furthermore, under the existing law and decisions with respect to a situation such as this, these moneys were paid out by the bank in due course, apparently, and there has been absolutely no demand ever made for the return of these moneys at any time. Certainly on that point alone the plaintiff has failed to make out a case, inasmuch as Section 244 of the Second Class Cities Law and Section 64 of that Law, and other laws applicable to
90 the City of Yonkers, require that before any claim or any judgment can be entered against the City a claim must be duly filed in accordance with the provisions of those laws.

The case as it exists is simply a case of a bank having to make payments, not to the depositor, but to outside parties, and having honored the checks, having never made any demand for the return of the money, and having shown no reason for such return so far as this defendant is concerned, in view of the fact that the plaintiff is demanding the return of the moneys apparently on the ground of insolvency. I do not know of any other grounds. And having

failed to prove insolvency, the plaintiff is out of court on that point.

I therefore ask that your Honor dismiss the complaint.

The law also requires, the State Law, notice of intention to sue, and that action must be commenced within one year after such notice is filed.

The Court: What do you say on the question of notice?

Mr. Romm: Our position is that the sections cited by counsel for the City do not refer to a claim of 92
the kind in suit. They refer more specifically to claims for work done for the City, personal injury accidents, property suits, and so forth, and not a claim of the character we are suing on.

The Court: They do specify the particular nature of the claims?

Mr. Romm: As I recall it—I have not read those sections within recent times—it might be worth while to look at them, if your Honor sees fit to do so.

The Court: I will see what the defendant claims as to that. What is the provision as to the presentation of claims?

Mr. Rosenwasser: Section 244 of the Second 93
Class Cities Law of the State of New York reads as follows:

(Omitted for brevity.)

That is all from Section 244.

Then there is Section 64, entitled (reading):

(Omitted for brevity.)

Mr. Romm: As to Section 244 of the Second Class Cities Law, which was read by Judge Rosenwasser, it seems apparent from a reading of it that

94 *Motion to Dismiss the Complaint.*

that specifically applies to injuries to persons or property arising from negligence.

The Court: That section does not apply. How about 64?

Mr. Romm: The last one, Section 64 of the Second Class Cities Law, that does not apply to the plaintiff at all, your Honor, because it states, in substance, that a claim must be filed with the proper bodies or officers of the City after the claim has been approved, or, rather, after the claim has been approved by a head of the department or officer of
95 the city who hired the claimant. In other words, by those words it could not possibly apply to the plaintiff in this case, because manifestly there is no officer or head of any department in the City of Yonkers who would approve our claim so we could file it with the proper authorities. That section applies to situations where a man does work of some kind for the City of Yonkers or supplies material to it.

And, further, you see that this amounts to a failure to file a claim by giving notice, which is for
96 the first time stated by the corporation counsel in his motion, has never been set up, and that is necessary to this suit. It is our position that it is well established that a defense of that kind must be affirmatively pleaded so it could be heard by the Court.

Mr. McAneny: The complaint alleges that there has been a due demand. That is denied absolutely, which gives an absolute issue on that point. There has not been any demand even proved in this case.

Mr. Romm: Letters have been sent.

Mr. McAneny: I move to strike that out.

The Court: What is that?

Mr. McAneny: I move to strike out the remark of counsel that letters have been sent.

Mr. Romm: And mailed to the defendants.

Mr. McAneny: Do not interrupt me.

Mr. Romm: I was trying to answer the Judge.

The Court: Let the Corporation Counsel proceed.

Mr. McAneny: You did allege due demand. It was denied. You have proved no demand whatever and, furthermore, you proved no due demand under the law. 98

The Court of Appeals has held that that provision which bases a claim against the city applies to every kind of action, legal or equitable. The case of Thomann *v.* The City of Rochester, 256, N. Y. 165 disposes of that question and the City cannot be held liable without such a claim except on a fixed claim, fixed by contract or a fixed salary or fixed in some way so that the comptroller might be mandamused to pay it; that on any claim upon which there is no fixed liability, upon which a mandamus would not lie, it is required by law that a claim be made.

No such claim has been made in this case and no demand whatsoever. I think if your Honor will read that case I just cited and others we are going to submit to you you will find that that is a fatal defect in the plaintiff's case. The proof of filing the claim is a condition precedent which does not require that it be set up affirmatively. That is one of the points upon which we argue. 99

We further argue that there has been no insolvency shown, as against the defendant in this action. No insolvency, under the National Banking Law, may be deemed to exist with reference to the ordinary transactions of a bank, that is to say, as between

the bank and its depositors. This money is in the bank and they may have closed down and paid it out. It is necessary that they show as a matter of fact that it was paid out while it was actually insolvent. We do not admit that the bank was ever insolvent or that it is insolvent today, as a matter of fact.

Furthermore, we move to dismiss on the ground that the plaintiff would not be entitled to recover anything without a tender back of the securities.

The Court: Would not it be better to withhold action on your motion?

Mr. McAneny: I think so, so that we can submit a brief on the law.

The Court: So we can dispose of these questions. It does involve a question of a claim and presentation of a claim. So I think it is better to withhold my decision on your motion for the present and hear the defendant's case. It probably won't be very long.

Mr. McAneny: You reserve decision?

The Court: Yes, I reserve decision.

Mr. McAneny: I would like to offer in evidence a stipulation with respect to the answer.

The Court: Paragraph 13.

(Marked Defendant's Exhibit A.)

Mr. McAneny: I would like to offer in evidence a copy of an order dated the 19th day of October, 1933 by Honorable Joseph Morschauser, Justice of the Supreme Court of the State of New York in an action entitled City of Yonkers and the Board of Education in the City of Yonkers, Plaintiff, *v.* Carl Sherman, as Attorney General of the State of New York.

Mr. Romm: Is it certified?

Mr. McAneny: No, we haven't had it certified. It is a correct copy.

Mr. Romm: I have never checked it up in court.

Mr. McAneny: Do you object to it on the ground that it is not certified?

Mr. Romm: Let us examine it.

Mr. McAneny: If you object, we will have to go and get it certified.

Mr. Moore: May I take about three or four minutes to read this over?

The Court: Yes. 104

Mr. Moore: I do not know whether the income provision of this order was put in the budget or not. I am not going to raise any question with Mr. McAneny about the certification of this order. Mr. McAneny and I have known each other too long. If he says it is a correct copy, I will take his word for it. I do not know how it is competent, relevant or material. I object to it on that ground. He started to read an order issued by Judge Morschauser back in 1933 of the Supreme Court of the State of New York.

Mr. Garrity: Back in 1911 a man by the name of Saunders died and left a fund of money to the City of Yonkers to set up and establish a trade school. That money up to 1924 was sufficient to run the school. In 1924 it was necessary for the City of Yonkers to include in their annual estimate sufficient funds to support the school and its teachers. By this order of Judge Morschauser the income from that particular fund was to be paid into the general city fund of the City of Yonkers. 105

Mr. Romm: The order shows the payment of the income from the Saunders Trade School Fund into the City. It states that in completing its annual

106 *Motion to Dismiss the Complaint.*

budget fund an estimate of the income was included as an item of the estimated income from the Saunders Trade School Fund. But I do not know whether that was actually done.

Mr. McAneny: We will show it was.

Mr. Moore: Whether they observed all the terms of the order.

The Court: Objection overruled. You may examine it later on for any corrections.

Mr. Moore: Exception.

107 The Court: And move to strike it out if it appears to have any errors in it.

(Marked Defendant's Exhibit B.)

Mr. Garrity: We also offer in evidence a copy of a resolution of the Board of Estimate and Apportionment designating the First National Bank of Yonkers, the Yonkers Trust Company and the Bryn Mawr-Nepperhan National Bank to appear as bank depositories of city funds.

Mr. Moore: I object to it as incompetent.

Mr. McAneny: It is the same resolution that was offered before.

108 The Court: Objection overruled. Exception to the plaintiff. Received.

Mr. Moore: Exception.

(Marked Defendant's Exhibit C.)

Mr. Moore: It is not completed.

Mr. Romm: It was in the other two cases but not in this case.

Mr. McAneny: It is a matter of our defense or proof.

The Court: I think it is evidentiary. I think it should be received.

Mr. Moore: All right. Exception.

The Court: Exception to the plaintiff.

Mr. McAneny: Will counsel for the plaintiff concede that the First National Bank and the Yonkers Trust Company and the Bryn Mawr-Nepperhan National Bank was consolidated on September 30, 1929?

Mr. Moore: I will.

Mr. McAneny: Will counsel for the plaintiff concede that upon that consolidation all of the securities of the constituent banks held by the City of Yonkers as securities for deposits were turned over to the First National Bank and Trust Company and thereafter held by the City as security for its deposits in that bank?

Mr. Moore: I cannot consent to that because I do not know it to be a fact.

Mr. McAneny: I would like to read into the record Sections 69 and 70 of the Second Class Cities Law.

The Court: It is unnecessary to read that again. Let the stenographer copy it in the record.

Mr. Moore: I will stipulate that it be incorporated in the record.

The Court: Overruled.

Mr. Moore: With the same objection.

The Court: Objection overruled. Exception to the plaintiff.

Mr. Garrity: Second Class Cities Law of 1909, Chapter 55 as Amended:

(Omitted for brevity.)

112 *Stephen A. Roake, for Defendant—Direct.*

STEPHEN A. ROAKE, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. McAneny:

Q. Mr. Roake, you hold a position with the City of Yonkers, do you not? A. Yes, sir.

Q. What is that? A. Assistant Cashier, Department of Finance.

Q. How long have you held that position? A. Since 1923 or thereabouts.

113 Q. You held that position under the City Treasurer of Yonkers up to what time? A. Up to December 31, 1933, when the office of City Treasurer was abolished.

Q. You are now assistant cashier in the Department of Finance? A. Yes.

Q. You have held that position continuously since the first date you mentioned? A. Yes, sir.

Q. And the City Treasurer is an elected city officer, is he not, or was? A. He was, yes.

Q. Have you before you a copy of the budget of the City of Yonkers for the year 1931? A. Yes, sir.

114 Mr. McAneny: I ask to have that marked in this case.

(Marked Defendent's Exhibit D for identification.)

The Court: Do you want to mark any particular pages?

Q. Is there any item in that budget or annual estimate under the caption "Saunders Trade School"? A. Yes.

Q. Will you read what that item is?

The Court: What page?

The Witness: Page 4, state of credits, that is, revenue, estimated revenue, Saunders Trade School Fund, $23,000.

Q. That was revenue derived by the city? A. The estimated revenue.

Q. That was an item in the annual budget? A. Yes.

Q. Will you take the budget of the City of Yonkers for 1932? Have you that before you? A. Yes.

Mr. McAneny: I ask to have that marked for identification. 116

(Marked Defendant's Exhibit E for identification.)

Q. Will you turn to the item in the budget referring to the Saunders Trade School and read what that states? A. 1932 budget, page 4, estimated revenue Saunders Trade School Fund, $22,000.

Q. Will you refer to the budget for the year 1933, budget of the City of Yonkers, and indicate or state what that budget states with reference to the Saunders Trade School?

Mr. McAneny: I ask to have that marked for identification. 117

(Marked Defendant's Exhibit F for identification.)

A. 1933 budget, estimated revenue, Saunders Trade School Fund, $23,000.

The Court: What page is that?

The Witness: Page 4.

Q. Will you turn to the exhibit which is marked Defendant's Exhibit D under the Board of Education and to a

118 *Stephen A. Roake, for Defendant—Direct.*

statement in there headed "Saunders Trade School," and state upon what page that is found? A. That is under the "Bureau of Trade Schools."

The Court: What page?

The Witness: 54.

Q. Department of Education? A. Department of Education.

Q. That is a part of that budget? A. Yes, sir.

Q. A part of the completed city budget? A. Yes.

119 Q. Does that refer to the Saunders Trade School? A. It refers to the Bureau of Trade Schools.

Q. Was the Saunders Trade School included in that Bureau? A. Yes. It does not so state here.

Q. But it is, as a matter of fact? A. Yes.

Q. I think there is only one trade school in the City of Yonkers. A. There is only one trade school.

Q. That is the Saunders Trade School? A. That is right.

Mr. McAneny: I offer it in evidence, offer in evidence the sheet in that exhibit which covers the Bureau of Trade Schools, as testified to by the witness.

120

The Court: As on page 55?

The Witness: Pages 54 and 55.

Mr. McAneny: I make the same offer with respect to the similar items in the Board of Education budget as enumerated in the annual estimates of the City for 1932 and 1933, which is Defendant's Exhibits E and F for identification, and ask to let the witness state upon what pages those are found.

Mr. Moore: Is this the same question with reference to the City's budget?

Mr. McAneny: Yes.

Stephen A. Roake, for Defendant—Direct. 121

The Witness: 1932 budget of the Board of Education, pages 55 and 56, include the appropriations for the Bureau of Trade Schools.

Q. That is in the 1932 budget? A. 1932 budget.

Q. In the 1933 budget?

The Court: You have already gone over this before.

Mr. Romm: Page 4, he said before.

The Court: The estimate is $22,000.

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Q. To cover this income and these expenses? A. 1933 budget, pages 56 and 57, include appropriations for the Bureau of Trade Schools in the Board of Education.

Q. How much is that appropriation? A. The appropriation in 1933 entitled "Bureau of Trade Schools" $148,876.

Q. What was the appropriation for the other two years? Can you give us that? A. The 1932 appropriation of the Bureau of Trade Schools, $149,019.

Mr. Romm: Is that 1932 or 1931?

The Witness: 1931.

123

By the Court:

Q. The prior one was what? A. 1933.

Q. Estimated amount in 1932 for 1933? A. That is the estimate for 1932.

Q. The first one was for 1933? A. Yes.

Mr. Romm: What was the one for 1932 again, and on what page?

The Witness: Pages 56 and 57 include the 1932 appropriation for the Bureau of Trade Schools. The total of that Bureau is $149,019.

124 *Stephen A. Roake, for Defendant—Direct.*

By Mr. McAneny:

Q. You have the year 1931 there?

Mr. Moore: I do not know what the materiality of this is, and I will object to it and move to strike it out.

The Court: No, I will receive it.

Mr. Moore: Exception.

The Court: Yes, exception to the plaintiff.

125 A: The 1931 appropriation of the Bureau of Trade Schools, total amount of appropriation $144,590.50.

Mr. Romm: What page?

The Witness: The total is shown on page 55.

Mr. McAneny: Let these three extracts from those three budgets be given exhibit numbers.

The Court: Mark the pages.

Mr. McAneny: The pages have been marked for identification only, and I offer these pages in evidence, 1931, 1932 and 1933. Let them be given exhibit numbers, Exhibits D, E and F.

Mr. Romm: We want to examine them before

126 they go into evidence.

The Court: Mark them for identification.

Mr. McAneny: I have offered them in evidence.

Mr. Romm: You offered them to be marked for identification—they have been marked for identification.

Mr. McAneny: The defendant offers those pages in evidence.

The Court: The pages have been marked for identification. The plaintiff may examine them now. I think we better suspend. It is one o'clock.

Mr. McAneny: We will be a short time after recess.

The Court: We will suspend now until two o'clock.

(Recess to 2:00 p. m.)

AFTERNOON SESSION.

2:00 p. m.

STEPHEN A. ROAKE, resumed the stand.

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Direct examination continued by Mr. McAneny:

Mr. McAneny: I offer these pages in evidence. Counsel for the plaintiff has looked them over.

Mr. Moore: No objection, Mr. McAneny, to them.

The Court: Received.

(Defendant's Exhibits D, E and F for identification received in evidence.)

Q. Mr. Roake, you handled these accounts in the First National Bank and Trust Company entitled "The Saunders Trade School Fund," didn't you? A. Yes, sir.

Q. You made deposits in that account? A. I did. 129

Q. Deposited cash and checks in that account? A. Yes, sir.

Q. Where did the checks and cash that you deposited in the account come from? Where did you receive them from? A. Interest from mortgages, interest on other investments, bonds, and so on.

Q. Interest from the capital fund of the trust estate? A. Yes, sir.

Q. The moneys in that account as of March 3, 1933, were from those sources, were they not? A. Yes, sir.

Mr. McAneny: That is all.

130 *Gustav W. Klein, Jr., for Defendant—Direct.*

Mr. Moore: No cross examination.

(Witness excused.)

GUSTAV W. KLEIN, JR., called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. McAneny:

Q. Mr. Klein, are you an officer of the City of Yonkers? A. I am.

131 Q. What position do you hold? A. Deputy Comptroller of the City of Yonkers, Department of Finance.

Q. How long have you held that position? A. Since January 1, 1934.

Q. Prior to that time what position did you hold? A. I was City Treasurer of the City of Yonkers.

Q. From when to when? A. From January 1, 1932, to December 31, 1933.

Q. The office of City Treasurer was abolished as of the latter date? A. As of December 31, 1933.

Q. Were you then appointed a Deputy Comptroller? A. Yes, sir; that is right.

132 Q. In the Department of Finance? A. That is right.

Q. The position you now hold? A. That is right.

Q. As City Treasurer of the City of Yonkers was it part of your duties and your position to handle the securities that were pledged to secure city deposits in banks? A. It was.

Q. Referring to the deposit of securities referred to in the complaint in this action as having been deposited with the City of Yonkers, did you have custody of those securities? A. I did with an officer of the bank, yes.

Q. As of March 3, 1933, what was the par value of those securities? A. $535,000.

Q. Have those securities been returned to the bank or its representatives? A. They have, with the exception of $1,000.

Q. Have you receipts for the return of those securities? A. I have.

Mr. McAneny: I offer these receipts in evidence. They are the same as we had in the other cases.

Mr. Moore: Let me see them.

(Documents handed to Mr. Moore.)

(Document consisting of six sheets marked Defendant's Exhibit G.) 134

Q. Were those securities of the par value of $535,000, as you have testified, segregated to any separate funds or accounts in the City's financial set-up? A. They were not.

Q. What was said by Mr. Trudeau or yourself at the various times that these securities were returned?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial and a self-serving declaration.

The Court: Overruled; the same question as we had before. 135

Mr. Moore: Exception.

A. Mr. Trudeau and I had a conversation with reference to getting the money out of the bank, and he said that when I released the securities he would release the moneys. That is the way the accounts were cleaned out. As the balance dropped, we would return so much security.

Q. Do you recall the occasion upon which the check, Defendant's Exhibit B, was paid by the bank? Do you recall that circumstance? Will you look at that check? A.

136 *Gustav W. Klein, Jr., for Defendant—Cross.*

A check drawn on the Saunders Trade Trustee Fund for $4,971.38.

Q. Was anything said with regard to those securities when that amount was paid by the bank? A. Not to my knowledge.

Mr. McAneny: Is that check in evidence?

Mr. Garrity: I do not think it has been submitted yet.

The Court: It was referred to as Exhibit B.

Mr. McAneny: I will offer this check in evidence
137. at this time. It has been identified by Mr. Power.

Mr. Moore: No objection to it.

(Marked Defendant's Exhibit H.)

Q. Was that one of the payments upon which you returned securities? A. It might have been. I think on May 4th, the date that check was paid, I returned to the First National Bank, I think, $9,000 worth of securities.

Q. That payment was taken into your calculation? A. That is right.

Mr. McAneny: That is all.

138 *Cross examination by Mr. Moore:*

Q. Mr. Klein, was there any pledge agreement drawn up between the bank and you as treasurer or as deputy comptroller with reference to the deposit of securities with the City for the deposit of the fund of the City in the bank? A. Not to my knowledge.

Q. Where were those securities kept? A. Those securities were kept in the safe deposit box of the bank, boxes. There was more than one box.

Q. That was under the general control of whom? A. General control of the treasurer then and the officers of the bank.

Q. One could not get in without the other? A. That is right.

Q. You both had joint possession of the boxes? A. That is right.

Q. Was there any written pledge agreement? I have asked that before. A. I have no knowledge of it.

Q. Was there one? A. Not to my knowledge.

Mr. Moore: That is all.

Re-direct examination by Mr. McAneny:

140 Q. Mr. Klein, what was the arrangement which you, as Treasurer of the City of Yonkers, made or arranged by you as such Treasurer and the bank itself as to the deposit of these securities with you?

Mr. Moore: I object to that as calling for a conclusion of the witness.

The Court: He has asked what was said.

Mr. Moore: Will you read the question?

Q. (Read by the stenographer.)

The Court: Sustained as to form and calling for a conclusion.

141 Q. Was anything said by you to the officers of the bank at the time you made deposits in City accounts in the bank?

Mr. Moore: In the Saunders Trade School case, Mr. McAneny?

Mr. McAneny: No, I am talking about this whole $535,000.

A. Yes, at times, especially during tax collections when the deposits would run very heavily; at that season of the year I would call the bank up and ask them for more security to

142 *Gustav W. Klein, Jr., for Defendant—Re-direct.*

secure the deposits that were given, and they were placed with the others.

Q. This bank always gave you securities in excess of the actual City deposit in the bank? A. It ran about the same, yes.

Q. How long to your knowledge had this bank been giving security for deposits? A. When I first was Deputy City Treasurer—that was in 1936—that same arrangement was in effect and the same arrangement for operation at the time I was Treasurer and Deputy Treasurer.

143 Mr. Romm: We move to strike out the answer as not responsive. He was asked as to the plaintiff bank, and the answer is as to some other bank.

The Court: Yes. The plaintiff bank was not in existence in 1929.

Q. As to the constituent banks?

Mr. Romm: Objected to as incompetent, irrelevant and immaterial.

The Court: How is it competent, Mr. McAneny?

Mr. McAneny: It is competent to show that this bank had pledged assets for a number of years.

144 The Court: That already appears.

Mr. McAneny: I will withdraw that.

Q. Since the First National Bank and Trust Company became a consolidation of the other three banks, do you know what the situation then was with regard to their giving security to the City? A. The First National Bank, they held the same procedure as the other banks. When deposits in there accrued in excess of security, I called them up and they would always add additional security to the list we already had.

Q. How far did it run with respect to the First National Bank and Trust Company, that is, the merged bank? A. That same procedure was in effect on January 1, 1932, when I was treasurer.

Q. It ran during all the time that you were City Treasurer? A. That is right.

Mr. McAneny: That is all.

Re-cross examination by Mr. Moore:

Q. Mr. Klein, who would deliver these securities to you? A. Why, it was sometimes a young lady by the name of Miss Roberts in the First National Bank and then Miss Nadashy, I think it is. 146

Q. Was Miss Roberts an officer of the bank? A. Not to my knowledge.

Q. Was Miss Nadashy an officer of the bank? A. I think she was.

Q. What position did she hold, if you know?

Mr. McAneny: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. McAneny: Exception. 147

A. I think she was assistant cashier.

Q. Were either of the women you have mentioned directors of the bank?

Mr. McAneny: I make the same objection.

The Court: If he knows.

Q. (Continuing) Do you know? A. I do not know.

Mr. McAneny: The plaintiff has made a pledge. That has been admitted.

The Court: He states he does not know.

148 *Motion to Dismiss the Complaint.*

Q. You came with the City after 1928, was it, beginning back in 1932? A. I was with the City in 1926 and 1927; then again in 1932.

Q. Beginning with 1928 and to 1932 you were not with the City? A. That is right.

Q. You do not know what happened in the time when you were not there? A. I have no knowledge.

Mr. Moore: That is all.

149 Mr. McAneny: The defendant rests.

I renew my motion to dismiss the complaint upon the grounds already stated, which are to the effect that so far as moneys that were paid out on these checks are concerned, there is no evidence of any insolvency of the bank.

Furthermore, that the moneys were public moneys within the intention and within the wording of Section 90 of the National Banking Law and that they were legally secured, and that any payment out of this account was secured in any manner and particularly in the manner covered by the testimony in this case showing a legal and 150 valid transaction binding upon the bank, the Conservators and Receivers.

On the further ground that there has been no demand made against anyone for the return of any of this money and there has been no service of any claim upon the officers of the City, as required by the laws of the State of New York.

It seems to me that viewing the whole circumstances in this case it would be iniquitous to claim or hold that these trustees who have acted within the law and who have received these moneys and deposited them in the national bank and being fully secured as to all their deposits, having

no profit whatever in this situation, acted merely as trustees and having in good faith drawn these checks and these checks having all been paid out by the bank without question, that now six years later we should be haled into court and told that these trustees are personally liable and must refund these moneys; it seems to me that the whole course of conduct of the trustees and the bank and the representatives of the bank would make such an act very inequitable. So far as I can see, it is absolutely legal.

The cases hold that the State of New York, and it is the practice of the state banks and other institutions or depositories to give securities for public money, and I believe that 152
the interpretation of Section 90 by the United States Supreme Court in the case just mentioned, McNair, Receiver, *v.* W. D. Knott, Treasurer, decided December 13, 1937 and not yet made public and published in the law books, covers this whole situation very clearly.

In that case the Supreme Court determined that in a case where there might be any question of competition for the deposit of public moneys between national banks and state banks, that the national banks could cover the course of procedure and take the same steps that state banks might take or that might affect state banks.

In the case cited of the City of Mount Vernon *v.* The 153
Mount Vernon Trust Company, decided by the Court of Appeals of this state, I think a careful examination of that opinion would show that the Court said that the City of Mount Vernon having received such securities for its municipal deposits of about $1,000,000 from the Mount Vernon Trust Company, that they might not be entitled to hold and hypothecate those securities and they could not secure them back without repaying to the City the amount of the deposit.

It is the same situation that might be urged in this case. In other words, the City had the securities and the bank

154 *Motion to Dismiss the Complaint.*

paid through the medium of these checks, I think no payments were ever made directly to the City, through the medium of these checks to those persons who presented the checks and received their money, the bank paying up to the amount of the City's deposits and received back its collateral, and it is apparent from this record that there were particular City funds or City deposits which were covered by the same collateral. But it is apparent that the same procedure went through with without question and the bank paid these checks and got their collateral back, and that is
155 what the Court of Appeals says they would have to do in this State. I believe that the United States decisions from its Supreme Court and the one I last cited would bear out the fact that under such conditions the First National Bank and Trust Company had that power to make this deposit of securities and were within their legal rights in getting them back and paying the City the amount of the City deposits. I think it is shown in this case that there was $535,000 worth of par value of securities held by the bank and they were returned to the City on the payment to the City of a far lesser amount than those securities represented.

In other words, it was an excellent thing for the bank
156 itself to get back those pledged securities and to pay a much lesser sum than represented the City's account. All of this indicates that the bank acted voluntarily. No question about that. The transaction was consummated and here six years after this suit is brought.

As I say, it becomes a question of fact as to whether or not those were public funds or of such a nature as to be considered as public funds and, secondly, as to whether there was any undue payment received by reason of insolvency or by reason of any other claim as to why these moneys should be refunded. In that case of McNair *v.* Knott, Judge McReynolds in determining the case with a

concurring opinion written by Mr. Justice Black, in his concurring opinion Judge McReynolds viewed the case like this where there had been this relationship between the parties and the matters had been consummated and gone through with, he said that it seemed to him that there was nothing to decide the case on without going into the question of power under Section 90.

I ask your Honor if you will read that case. Your Honor is inclined to reserve decision on this motion until we can submit those authorities. Perhaps it might help us if your Honor could give us that opportunity. 158

The Court: The evidence is closed?

Mr. Moore: Yes.

The Court: I deny your motion, with the same reservation at the close of the other cases.

Mr. McAneny: I ask the Court to make a finding in favor of the defendants.

The Court: I will withhold any action on this motion at this time.

Suppose you submit briefs on February 7th. You may send them to me at Buffalo at the Federal Courthouse.

Mr. McAneny: I assume that we will file separate briefs without the exchange of briefs and reply briefs.

Mr. Moore: Yes. 159

160 **Plaintiff's Exhibit 1.**

Treasury Department
Office of Comptroller of the Currency

TREASURY DEPARTMENT

No. 653.

Office of the Comptroller of the Currency

Washington, D. C., March 20, 1933

WHEREAS, From information on file in this bureau, I am satisfied that "The First National Bank and Trust Company of Yonkers," located in the City of Yonkers, County
161 of Westchester, and State of New York, is unable to transact and carry on its ordinary banking business, or to exercise its usual banking functions without prejudicing the rights of depositors and other creditors, and

WHEREAS, I deem it necessary to take immediate steps in order to conserve the assets of said bank for the benefit of the depositors and other creditors thereof:

NOW, THEREFORE, I, F. G. Awalt, Acting Comptroller of the Currency in pursuance of the power and authority vested in me by law and under the provisions of Title II, known as the "Bank Conservation Act" of an Act of Congress entitled "An Act to provide relief in the existing
162 national emergency in banking, and for other purposes," approved March 9, 1933, do hereby appoint P. W. Trudeau Conservator of "The First National Bank and Trust Company of Yonkers," with all the powers, duties and responsibilities given to or imposed upon such officer under the provisions of said Act of Congress authorizing the appointment and creating the duties of a Conservator.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twentieth day of March, A. D., 1933.

F. G. AWALT,
Acting Comptroller of the Currency

(SEAL)

(Duly certified April 15, 1933.)

Plaintiff's Exhibit 2.

TREASURY DEPARTMENT

No. 653.

Office of the Comptroller of the Currency

Washington, D. C. July 24, 1933

WHEREAS, P. W. TRUDEAU, was duly appointed and commissioned Conservator of "The First National Bank and Trust Company of Yonkers", located in the City of Yonkers, County of Westchester and State of New York, on the twentieth day of March, 1933, and whereas the said P. W. 164
Trudeau has resigned to take effect at the close of business on July 24, 1933:

NOW, THEREFORE, I, J. F. T. O'CONNOR, Comptroller of the Currency, do hereby appoint LOUIS D. ROSSIRE Conservator of "The First National Bank and Trust Company of Yonkers", to take effect at the close of business on the twenty-fourth day of July, 1933, in place of the said P. W. TRUDEAU, with all the powers, duties and responsibilties given to or imposed upon a Conservator under the provisions of Title II, known as the "Bank Conservation Act" of an Act of Congress entitled "An Act to provide relief in the existing national emergency in banking, and for other 165
purposes", approved March 9, 1933.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twenty-fourth day of July, A. D. 1933.

Comptroller of the Currency
J. F. T. O'CONNOR

(SEAL)

(Duly certified September 9, 1933.)

166

Plaintiff's Exhibit 3.

TREASURY DEPARTMENT

No. 653

Office of the Comptroller of the Currency

Washington, D. C., January 23, 1934.

WHEREAS, From information on file in this bureau, I am satisfied that "The First National Bank & Trust Company," located in the City of Yonkers, County of West-
167 chester, and State of New York is insolvent and unable to pay its just and legal debts:

NOW, THEREFORE, I, J. F. T. O'CONNOR, Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of Section 1 of an Act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks, and for other purposes," approved June 30, 1876, do hereby appoint Arthur E. Muth, Receiver of "The First National Bank & Trust Company of Yonkers," with all the powers, duties and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United
168 States which authorize the appointment of a Receiver.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twenty-third day of January, A. D. 1934.

J. F. T. O'CONNOR
Comptroller of the Currency

(Seal)

(Duly certified May 27, 1936.)

Plaintiff's Exhibit 4.

TREASURY DEPARTMENT

No. 653

Office of the Comptroller of the Currency

Washington, D. C., November 15, 1937.

WHEREAS, Arthur E. Muth was duly appointed and commissioned Receiver of "The First National Bank & Trust Company of Yonkers," located in the City of Yonkers, County of Westchester and State of New York on the twenty-third day of January, 1934, and whereas the said Arthur E. Muth has resigned to take effect at the close of business on November 15, 1937.

NOW, THEREFORE, I, William Prentiss, Jr., Acting Comptroller of the Currency, do hereby appoint Walter F. Downey Receiver of "The First National Bank & Trust Company of Yonkers" to take effect at the close of business on the fifteenth day of November, 1937, in place of the said Arthur E. Muth, with all the powers, duties, and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this fifteenth day of November, A. D., 1937.

WILLIAM PRENTISS, JR.
Acting Comptroller of the Currency.

(Seal)

(Duly certified November 16, 1937.)

172

Plaintiff's Exhibit 5.

PROCLAMATION.

(SEAL OF STATE.)

STATE OF NEW YORK.

EXECUTIVE CHAMBER.

Until early this morning it was my hope that it would not be necessary to interrupt the continuous operation of the banking system of New York State. The spread of hysteria and the restrictions imposed upon the banking
173 facilities of the country through measures adopted in so many states have at last placed upon the New York banks a burden so great that it has finally rendered drastic action imperative here.

Therefore, at a meeting early this morning the Clearing House Committee of the New York Clearing House, with the advice and recommendation of the Federal Reserve Bank of New York, has asked me to proclaim a banking holiday lasting until the close of business, Monday, March 6th.

I make this proclamation with complete conviction that
174 the best interests of the people of the State are being served thereby. This is a time for coolness and leadership. The people of this State and of the whole nation have shown a splendid spirit to date in meeting all the trying problems of the depression. I am confident that this spirit will be maintained.

The interval which this holiday affords should give responsible officials the necessary opportunity to consider the situation calmly and to prepare the way for an adjustment of our difficulties.

Plaintiffs' Exhibit 5.

175

NOW, THEREFORE, I, Herbert H. Lehman, Governor of the State of New York, do hereby proclaim and set apart Saturday, March 4th, and Monday, March 6th, as holidays on which all banking institutions will be closed.

GIVEN under my hand and the Privy Seal of the State at my residence, 820 Park Avenue, in the City of New York, this fourth day of March in the year of our Lord One Thousand nine hundred and thirty-three.

(SEAL)

HERBERT H. LEHMAN

176

BY THE GOVERNOR:

JOSEPH J. CANAVAN
Secretary to the Governor

State of New York
Department of State
Filed Mar 4—1933

EDWARD J. FLYNN
Secretary of State

177

178

Plaintiff's Exhibit 6.

PROCLAMATION.

(SEAL OF THE STATE.)

STATE OF NEW YORK.

EXECUTIVE CHAMBER.

WHEREAS, a proclamation has been issued by the President of the United States declaring a bank holiday to and including March ninth, one thousand nine hundred thirty-three:

179

NOW, THEREFORE, I, Herbert H. Lehman, Governor of the State of New York, do hereby declare that the bank holiday heretofore declared by me in the State of New York is extended to and including said March ninth, one thousand nine hundred thirty-three.

GIVEN under my hand at 820 Park Avenue in the City of New York and under the Privy Seal of the State at the Capitol in the City of Albany this sixth day of March in the year of our Lord one thousand nine hundred thirty-three.

(SEAL.)

180

HERBERT H. LEHMAN

BY THE GOVERNOR:

JOSEPH J. CANAVAN
Secretary to the Governor

State of New York
Department of State
Filed Mar 11—1933

EDWARD J. FLYNN
Secretary of State

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

CONSERVATOR'S
No. A 7523

Name Saunders Trade School
TRUSTEES FUND ACC'T
Main Office

Address c/o City Treasurer
City Hall, City

Old Balance	Date	Checks in Detail	Date	Deposits	Date	New Balance
		Balance Brought Forward			Mar 25 '32	22,949.09
22,949.09			Mar 31 In	61.88	Mar 31 In	23,010.97*
23,010.97			Apr 20 '32	2,273.75	Apr 20 '32	25,284.72*
25,284.72			Apr 29 In	69.39	Apr 29 In	25,354.11*
25,354.11			May 16 '32	1,705.00	May 16 '32	27,059.11*—
27,059.11			May 28 In	73.39	May 28 In	27,132.50*—
27,132.50	Jun 7 '32	17,000.00—			Jun 7 '32	10,132.50*—
10,132.50			Jun 10 '32	990.00	Jun 10 '32	11,122.50*—
11,122.50			Jun 30 In	50.95	Jun 30 In	11,173.45*—
11,173.45			Jul 9 '32	1,636.25	Jul 9 '32	12,809.70*—
12,809.70			Jul 29 In	34.60	Jul 29 In	12,844.30*—
12,844.30			Aug 4 '32	2,585.00	Aug 4 '32	15,429.30*—
15,429.30			Aug 30 In	43.41	Aug 30 In	15,472.71*—
15,472.71			Sep 2 '32	27,011.76	Sep 2 '32	42,484.47*—
43,857.69			Sep 21 '32	1,265.00	Sep 21 '32	43,749.47*—
42,484.47*—			Sep 29 In	108.22	Sep 29 In	43,857.69*—
42,749.47			Oct 15 '32	2,273.75	Oct 15 '32	46,131.44*
46,131.44	Oct 28 '32	19,500.00—			Oct 28 '32	26,631.42*
26,631.42						26,631.42*—
26,631.42			Oct 28 '32		Oct 28 '32	26,631.44*—
26,631.44			Oct 31 In	128.04	Oct 31 In	26,759.48*
26,759.48			Nov 5 '32	1,705.00	Nov 5 '32	28,464.48*
28,464.48			Nov 30 In	82.45	Nov 30 In	28,546.93*
28,546.93			Dec 22 '32	990.00	Dec 22 '32	29,536.93*
29,536.93			Dec 30 In	82.09	Dec 30 In	29,619.02*
29,619.02			Dec 31 '32	100.83	Dec 31 '32	29,719.85*
29,719.85	Jan 3 '33	26,003.97—			Jan 3 '33	3,715.88*
3,715.88			Jan 4 '33	1,636.25	Jan 4 '33	5,352.13*
5,352.13	Jan 11 '33	3,007.97—			Jan 11 '33	2,344.16*
2,344.16			Jan 30 In	29.91	Jan 30 In	2,374.07*
2,374.07			Feb 4 '33	2,585.00	Feb 4 '33	4,959.07*
4,971.38	May 4 '33	4,971.38—	Feb 28 In	12.31	Feb 28 In	4,971.38*
4,959.07					May 4 '33	0.00*—

184

Defendant's Exhibit A.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

against

185

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendants.

L. 64-75.

The attorney for the plaintiff hereby consents that the defendants' answer be deemed amended so as to include therein a paragraph as follows:

186 "Fourth-A: Denies each and every allegation contained in the paragraph of the complaint numbered 'Sixth'".

Dated, November 24, 1937.

BENJ. W. MOORE
Attorney for Plaintiff

LEONARD G. MCANENY
Attorney for Defendant

H. G. GARRITY

187

Defendant's Exhibit B.

At a Special Term of the Supreme Court held in and for the County of Westchester at the County Court House in the City of White Plains, N. Y. on the 19th day of October, 1923.

Present:

HON. JOSEPH MORSCHAUSER,
Justice

188

THE CITY OF YONKERS and the BOARD OF EDUCATION IN THE CITY OF YONKERS,
Plaintiffs

against

CARL SHERMAN, as the Attorney General of the State of New York,
Defendant

189

On reading and filing the petition of THE CITY OF YONKERS and THE BOARD OF EDUCATION IN THE CITY OF YONKERS, verified the 6th day of July, 1923, praying for an Order of this Court, directing payment to The City of Yonkers of certain funds known as the Saunders Trades School Trust Fund, to be applied in reduction of the cost of maintenance to the City of Yonkers of the Saunders Trades School; and after hearing WALTER B. J. MITCHELL, of Counsel for JAMES TAYLOR LEWIS, Corporation Counsel of the City of Yonkers, in support of said petition and order, and the defendant, CARL SHERMAN, Attorney Gen-

190 *Defendant's Exhibit B.*

eral of the State of New York, having appeared in said proceeding by ROBERT P. BEYER, Esq., and after due deliberation thereon,

Now on motion of JAMES TAYLOR LEWIS, Corporation Counsel of the City of Yonkers and Counsel for the Board of Education in the City of Yonkers, it is

ORDERED that the sum of Thirty-two Thousand Dollars ($32,000.00) be paid by the City of Yonkers from the income account of the Saunders Trades School Trust Fund, in
191 reduction of the maintenance of the Saunders Trades School during the year 1921; and for the purpose of making such payment, the Comptroller and the City Treasurer of the City of Yonkers are hereby ordered and directed to draw a check in that amount, to the order of the City of Yonkers, New York, and that said check of Thirty-two Thousand Dollars ($32,000.00) be deposited to the credit of the City of Yonkers and applied to the amount stated as due and owing to the City of Yonkers by the said Saunders Trades School Fund in the annual estimate of the Board of Estimate and Apportionment of the City of Yonkers for the fiscal year 1921; and it is further

192 ORDERED that the sum of Thirty-two Thousand Dollars ($32,000) be paid by the City of Yonkers from the income account of the Saunders Trades School Trust Fund, in reduction of the maintenance of the Saunders Trades School during the year 1922; and for the purpose of making such payment, the Comptroller and the City Treasurer of the City of Yonkers, are hereby ordered and directed to draw a check in that amount, to the order of the City of Yonkers, New York, and that said check of Thirty-two thousand Dollars ($32,000.00) be deposited to the credit of The City of Yonkers, and applied to the amount stated as due and owing to the City of Yonkers by the said Saunders

193

Trades School Fund in the annual estimate of the Board of Estimate and Apportionment of the City of Yonkers for the fiscal year 1922; and it is further

ORDERED that the sum of Thirty Thousand Dollars ($30,000.00) be paid by the City of Yonkers from the income account of the Saunders Trades School Trust Fund, in reduction of the maintenance of the Saunders Trades School during the year 1923; and for the purpose of making such payment, the Comptroller and the City Treasurer of the City of Yonkers are hereby ordered and directed to draw a check in that amount, to the order of The City of 194
Yonkers, New York and that said check of Thirty Thousand Dollars ($30,000.00) be deposited to the credit of the City of Yonkers, and applied to the amount stated as due and owing to The City of Yonkers by the said Saunders Trades School Fund in the annual estimate of the Board of Estimate and Apportionment of the City of Yonkers for the fiscal year 1923; and it is further

ORDERED That the Board of Estimate and Apportionment of the City of Yonkers from henceforth, in preparing its annual estimate of revenues and expenditures of the said City of Yonkers, shall include therein an estimate of the amount of income accrued or to be accrued for the said 195
fiscal year from the Saunders Trades School Trust Fund, and the Comptroller and City Treasurer of the City of Yonkers are hereby authorized and directed to pay to the City of Yonkers, New York, the amount of income thereof, in reduction of the amount of revenue as estimated in the annual estimate of the Board of Estimate and Apportionment of the City of Yonkers, as hereinbefore set forth; and in the event of the income of said Saunders Trades School Trust Fund being in excess of the amount of estimated revenue, said excess shall be applied in a manner as though the estimate of revenue had been the amount actually re-

196 *Defendant's Exhibit C.*

ceived as income from the said Saunders Trades School Trust Fund.

Enter in Westchester County,

JOSEPH MORSCHAUSER,
Justice of the Supreme Court.

Defendant's Exhibit C.

197

Resolution of Board of Estimate and Apportionment of The City of Yonkers, adopted July 10, 1929.

By Mr. Davis:—

Resolved, That the First National Bank, Yonkers National Bank and Trust Company, Yonkers Trust Company, Westchester Trust Company, the Bryn-Mawr-Nepperhan National Bank and the Central National Bank be designated as banks and trust companies for the purpose of depositing all moneys of the city received by the City Treacurer of the City of Yonkers; and the City Treasurer
198 is hereby directed to continue to procure adequate security for all moneys deposited by him in any or all of the depositories hereinbefore designated, securing and protecting the City of Yonkers against any loss of the moneys so deposited. The action of the City Treasurer in procuring interest upon the following moneys in the following accounts is hereby approved: On average daily balance of accounts known as General Accounts, two per cent (2%) to be paid semi-annually on the 30th day of June and the 31st day of December; Firemen's Pension Fund, three and one-half per cent (3½%); Police Pension Fund, three and one-half per cent (3½%); Saunders Trade Fund,

three per cent (3%). The interest on the last mentioned accounts to be paid semi-annually on the 30th day of June and the 31st day of December in each year.

Adopted by the following vote:

Ayes—Mayor Fogarty, Council President Davis, Comptroller Loehr, Corporation Counsel Laragh and City Engineer Sheridan.

(Certified February 20, 1936.)

200

Defendant's Exhibit D.

Extract from Annual Budget, City of Yonkers, 1931

ITEMIZED STATEMENT OF EXPENDITURES FOR 1931

24. Department of Education
School District, City of Yonkers
Office of Superintendent

Bureau of Trades School

201

100	Personal Service		$125,626.00
	Salaries:		
	Principal	$ 5,200.00	
	Teachers	106,405.00	
	Registrars	1,675.00	
	Firemen	2,190.00	
	Watchman	1,825.00	
	Janitors	4,980.00	
	Secretary to Principal	1,750.00	
	Mimeograph Operator	1,600.00	

202 *Defendant's Exhibit D.*

102	Wages:		$ 700.00
	Substitute Teachers	700.00	
200	Transportation Service:		45.00
201	Traveling Expenses	30.00	
204	Express and Freight	15.00	
300	Communication Service:		225.00
301	Postage	100.00	
302	Telephone	125.00	
203			
400	Other Services:		4,630.00
401	Printing	36.00	
404	Heat, Light and Power	3,548.00	
407	Repairs to Structures	546.00	
408	Repairs to Equipment	500.00	
500	Supplies:		9,800.00
501	Office, Scientific and Educational	5,000.00	
509	Heat, Light and Power	4,500.00	
510	Cleaning and Janitorial	300.00	
204			
600	Replacement of Equipment:		353.00
602	Equipment	353.00	
800	Fixed Charges and Obligations:		3,212.50
801	Insurance	3,212.50	
	Total, Bureau of Trades School		$144,590.50

205

Defendant's Exhibit E.

Extract from Annual Budget, City of Yonkers, 1932

ITEMIZED STATEMENT OF EXPENDITURES FOR 1932

* * *

24. Department of Education
School District, City of Yonkers
Office of Superintendent

* * * *

206

Bureau of Trades School

100	Personal Services:		$132,201.00
101	Salaries:		
	Principal	$ 5,300.00	
	41 Teachers	112,870.00	
	Registrars	1,675.00	
	Fireman	2,196.00	
	Watchman	1,830.00	
	Janitors	4,980.00	
	Secretary to Principal	1,750.00	
	Mimeograph Operator	1,600.00	
102	Wages:		450.00
	Substitute Teachers	450.00	
200	Transportation Service:		52.00
201	Traveling Expenses	37.00	
204	Freight and Cartage	15.00	
300	Communication Service:		250.00
301	Postage	100.00	
302	Telephone	150.00	
400	Other Services:		5,661.00

207

208 *Defendant's Exhibit F.*

401	Printing	$ 36.00	$
404	Heat, Light and Power	3,550.00	
407	Repairs to Structures	725.00	
408	Repairs to Equipment	1,350.00	
500	Supplies:		8,600.00
501	Office Supplies	5,000.00	
509	Heat, Light and Power	3,300.00	
510	Cleaning and Janitorial	300.00	
600	Replacement of Equipment		345.00
602	Equipment	345.00	
800	Fixed Charges and Obligations		1,460.00
801	Insurance	1,460.00	
	Total, Bureau of Trades School		$149,019.00

209

Defendant's Exhibit F.

Extract from Annual Budget, City of Yonkers, 1933

210

ITEMIZED STATEMENT OF EXCEPTIONS FOR 1933

* * *

26. Department of Education
School District, City of Yonkers

* * *

Bureau of Trades School

100	Personal Services:	$133,896.00

Defendant's Exhibit F. 211

101	Salaries:			
	Principal	$ 5,450.00		
	Teachers	114,426.00		
	Registrars	1,675.00		
	Fireman	2,190.00		
	Watchman	1,825.00		
	Janitors and Assistants	4,980.00		
	Secretary to Principal	1,750.00		
	Mimeograph Operators	1,600.00		
102	Wages		$ 450.00	212
	Substitute Teachers	450.00		
200	Transportation Services:		15.00	
204	Freight and Cartage	15.00		
300	Communication Service:		250.00	
301	Postage	100.00		
302	Telephone	150.00		
400	Other Services:		4,138.00	
401	Printing	38.00		
404	Heat, Light and Power	3,200.00		
407	Repairs to Structures	300.00		213
408	Repairs to Equipment	600.00		
500	Supplies:		7,350.00	
501	Office Supplies	4,100.00		
509	Heat, Light and Power	3,000.00		
510	Cleaning and Janitorial	250.00		
800	Fixed Charges and Obligations:		2,777.00	
801	Fixed Charges—Insurance	2,777.00		
	Total, Bureau of Trades School		$148,876.00	

214

Defendant's Exhibit G.

March 28, 1933

Received from the Treasurer of the City of Yonkers the following bonds:

15,000.	County of Jefferson 5s, 1947	11,250.
10,000.	State of Louisiana 4¾s—1973	7,500.
5,000.	" " 4½s—1953	4,000.
25,000.	City of Orlando, Fla. 5½s—1952	12,000.
25,000.	Canadian International Paper 6s—1949	5,250.
215 25,000.	Teaneck, N. J. 5½s—1934	17,500.
30,000.	Ohio Public Service 1953	24,000.
10,000.	South Bay Consolidated Water Co. 5s—1950	6,000.
5,000.	Laclede Gas Light Co. 5½s—35	2,400.
5,000.	New Orleans 4½s—1956	4,250.
15,000.	Butte, Montana 6s—41	11,250.
10,000.	Portsmouth, Va. 5s—54	7,700.
7,000.	Town of Huntington, L. I. 4½s—1946	5,915.
10,000.	Norfolk, Va. 4½s—1935	9,400.
216 197,000.		128,415.

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator

FIRST NATIONAL BANK & TRUST CO.,
Yonkers, N. Y.

Defendant's Exhibit G. 217

April 3d, 1933.

Received from the Treasurer of the City of Yonkers the following Bonds:

$50,000.	State of Arkansas	4½	1942	37	$ 18,500.
55,000.	Town of Lyndhurst	5½		60	33,000.
50,000.	Commonwealth of Kentucky	4½		80	40,000.
14,000.	Winston-Salem, N. C.	4¾		90	12,600.
15,000.	State of South Dakota	5		89½	13,425.
3,000.	Bay City	4		80	2,400.
5,000.	Town of Greenburgh	4½	1953	81.5	4,075.
1,000.	" " "	4½	1954	18¼	812.50
					$124,812.50

218

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator

FIRST NATIONAL BANK & TRUST CO.,
Yonkers, N. Y.

219

April 7, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

$15,000.	Norfolk, Va. 4½s—1935	@	94	14,100.
25,000.	Union, N. J. 6s—1934	@	80	20,000.
40,000.				34,100.

220 *Defendant's Exhibit G.*

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

May 4, 1933.

221 Received from the Treasurer of the City of Yonkers, the following bonds:

5,000. City of Charlotte, N. C. 4½s due 1934
12,000. Galveston, Texas 5s—1933-5
15,000. Town of Greenburgh, N. Y. 4½s—1946
2,000. Town of Huntington, L. I. 4½s—1938
2,000. " " " 4½s—1945
10,000. City of New York 4½s—1965
2,500. State of Oregon 5½s—1938
2,500. " " 5½s—1945
2,500. " " 5½s—1945
2,500. " " 5½s—1946

222 1,000. Village of Sea Cliff, N. Y. 5s—1933
25,000. State of New Mexico 6s—1935
6,000. Seattle, Wash., 5s—1934
2,000. " " 5s—1940

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

Defendant's Exhibit G. 223

May 16, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

$10,000. City & County of San Francisco, school bonds 5s of 1945

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU 224
FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

Yonkers, N. Y., July 20, 1933

RECEIVED, from the Treasurer of the City of Yonkers the following bonds:

$2,000 Oregon State Highway 5½% bonds due Oct. 1, 1937; Nos. 5034 and 5035 $1,000 each

1,000 Oregon State Highway 5½% bond due Oct. 1, 1938; 225
No. 5110 and

1,000 Oregon State Highway 5½% Bond due April 1938; No. 5072

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

226

Defendant's Exhibit H.

(FRONT)

FINANCE DEPARTMENT, TREASURER'S OFFICE

Warrant No. —****—

No. 180

Yonkers, N. Y., May 3, 1933.

FIRST NATIONAL BANK OF YONKERS

Pay to the
— order of SAUNDERS TRADE SCHOOL FUND.....$4,971.38
227 City of Yonkers $4971 and 38 Cts.....Dollars

For Transfer check
Countersigned by
JAS. E. HUSHION
Comptroller.

G. W. KLEIN, JR.,
Treasurer.

(BACK)

SAUNDERS TRADE SCHOOL
Trust Fund Account

[Perforation]

PAID
5 4 33

228

[Endorsements]

Account of
SAUNDERS TRADE SCHOOL FUND
City of Yonkers

Pay to the Order of
Any Bank, Banker or Trust Co.
Previous Endorsements Guaranteed

MAY 3 1933
CENTRAL NATIONAL BANK
50-58 Yonkers, N. Y. 50-58
H. A. MERRITT, Cashier

Findings of Fact.

229

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, in Liquidation,

Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

L. 64-75.

230

This cause having duly come on to be tried by the Court without a jury, and the allegations and proofs of the parties having been fully heard, I find and decide as follows:

231

1. The defendant is a municipal corporation of the second class duly organized and existing under the laws of the State of New York, acting as the testamentary trustee of "The Saunders Trade School Fund."

2. On March 4, 1933 the defendant had on deposit in The First National Bank and Trust Company of Yonkers in a checking account captioned "Saunders Trade School Trustees Fund Account" the sum of $4,971.38. The bank has since September 30, 1929 been a national banking corporation organized and existing under the laws of the United States, with its principal place of business in the

232 *Findings of Fact.*

City of Yonkers, County of Westchester and State of New York.

3. The moneys in the account on March 4, 1933 represented income from the corpus of the Saunders Trust Fund.

4. On March 4, 1933 the Governor of the State of New York proclaimed a bank holiday and the bank did not open for business that day and never afterwards reopened for regular business.

233 5. On March 6, 1933 the President of the United States proclaimed a bank holiday and on March 9, 1933 the bank holiday was extended by further proclamation of the President.

6. The Comptroller of the Currency, pursuant to statute, appointed a Conservator of the Bank on March 20, 1933 and appointed a successor Conservator on July 24, 1933. On January 23, 1934 a Receiver was appointed to liquidate the Bank and the plaintiff was appointed successor to such Receiver on November 15, 1937.

7. On July 10, 1929 the Board of Estimate and Apportionment of the City of Yonkers, consisting of the Mayor, the Common Council President, the Comptroller, the Corporation Counsel and the City Engineer, passed a resolution designating five several banks as depositories "for all moneys of the City received by the City Treasurer" and directing the City Treasurer to "continue to procure adequate security for all moneys deposited by him" in the designated depositories.

8. On September 30, 1929 three of the depositories referred to in the resolution were merged under the name The First National Bank and Trust Company of Yonkers.

Findings of Fact.

9. On March 4, 1933 the Bank had on deposit with the City as security for the aforesaid account and for city deposits bonds having a par value of $535,000.

10. The defendant withdrew the $4,971.38 in the Saunders Trade School Trustees Fund account on May 4, 1933.

11. Between March 29, 1933 and July 20, 1933 the City returned to the Bank the pledged securities to the amount of $534,000 and retained bonds of the par value of $1,000.

12. The Conservator gave receipts for the returned bonds reciting therein "said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers."

13. A first dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 13, 1937.

14. No statute of the State of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

15. No statute of the State of New York confers upon state banks the specific power to pledge assets to secure deposits of the City of Yonkers.

16. No applicable ordinance or local law of the City of Yonkers confers upon any bank the power to secure the deposits of the City of Yonkers.

17. That the pledge of assets by the Bank to secure the deposits in the account of the Saunders Trade School Trustees Fund was illegal and *ultra vires*.

238 *Findings of Fact.*

18. That the Bank was insolvent as of the 6th day of March, 1933 and that the rights of the general creditors of the Bank became fixed as of March 6, 1933.

19. That the payment by the Bank to the City of Yonkers, as Trustee under the last Will and Testament of Irvin Saunders, from the "Saunders Trade School Trustees Fund Account" was made with the view to the preference of the City of Yonkers, as such Trustee, over other creditors of the Bank.

239 20. That no service of any notice of claim or of intention to sue by the Bank through its Receiver was required.

21. That the payment from the Saunders Trade School Trustees Fund account to the City of Yonkers, as such Trustee, was voluntarily made under a mistake of law but is nevertheless recoverable.

22. The plaintiff is entitled to recover the sum of $2,485.69, being the difference between the amount which the City of Yonkers, as such Trustee, should have received under the 50% dividend paid by the Bank and the sum of
240 $4,971.38 paid to the defendant, together with interest and the costs of this action.

23. The plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $2,982.83 from May 1, 1936 to November 2, 1937 and interest at the same rate on the sum of $2,485.69 from November 3, 1937 to the date of the judgment to be entered herein.

Dated, July 18, 1938.

JOHN KNIGHT,
District Judge.

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Defendant's Requests for Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

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THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75.

Comes now the above named defendant by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, its attorney, and considering the same to be material to the proper presentation of this case, respectfully requests the 243 Court to make and enter the following findings of fact and conclusions of law.

FINDINGS OF FACT.

1. That The First National Bank and Trust Company of Yonkers was and is for all purposes of this action a National Banking Institution organized and existing under and by virtue of the laws of the United States of America, having its only place of business in the City of Yonkers, State of New York.

244 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

2. That the City of Yonkers was and still is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

3. That the City of Yonkers was appointed Trustee of the Saunders Trade School Fund by the Last Will and Testament of Irvin Saunders, deceased, which was admitted to probate in the Surrogate's Court, Westchester County, on the 10th day of March, 1909; that pursuant to said Will, the proceeds of the income from the trust are used for the
245 erection and maintenance of a trade school in the City of Yonkers, New York.

4. That by an order of the Supreme Court of the State of New York, County of Westchester, dated the 19th day of October, 1923, the Board of Estimate and Apportionment of the City of Yonkers was directed, in preparing its annual estimate of revenues and expenditures of the City of Yonkers for the purpose of determining the amount necessary to be raised, by taxation, which estimate covers, among other things, the authorized expenditures and anticipated revenues for the Saunders Trade School to include an esti-
246 mate of the amount of income accrued or to be accrued for the fiscal year from the Saunders Trade School Fund, and the Comptroller and City Treasurer of the City of Yonkers were authorized and directed to pay the City of Yonkers the amount of income from said fund in reduction of the amount of revenue as estimated in the annual estimate of the Board of Estimate and Apportionment of the City of Yonkers, and it was further directed that, in the event of the income of said fund being in excess of the amount of the estimated revenue, the excess should be applied in a manner as though the estimate of revenue had been the amount actually received as income from the said Saunders Trade School Trust Fund.

Defendant's Requests for Findings of Fact and Conclusions of Law. 247

5. That the income from the Saunders Trade School Trust Fund was collected by the Comptroller or City Treasurer of the City of Yonkers and deposited by the Comptroller or City Treasurer in the First National Bank and Trust Company of Yonkers in an account entitled "Saunders Trade School Trustee's Fund."

6. That checks for the withdrawal of funds in the account "Saunders Trade School Trustee's Fund" were signed by the Comptroller and by the Treasurer of the City of Yonkers. 248

7. That by a resolution adopted by the Board of Estimate and Apportionment of the City of Yonkers on July 10, 1929, certain banks were designated as depositaries for all moneys of the City deposited by the City Treasurer and the City Treasurer was directed to "continue to procure adequate security for all moneys deposited by him" in the designated depositaries.

8. That on March 4, 1933, The First National Bank and Trust Company of Yonkers, the successor by merger to three of the depositaries designated in the resolution of the Board of Estimate and Apportionment of Yonkers of July 10, 1929, had on pledge with the City of Yonkers, bonds of the par value of $535,000 which had been procured by the City Treasurer of the City of Yonkers pursuant to said resolution of July 10, 1929 from time to time prior thereto to secure, among other deposits, deposits of the defendant made by said City Treasurer in the account, "Saunders Trade School Trustee's Fund", in the sum of $4,971.38. 249

9. That on March 4, 1933, the defendant had on deposit in The First National Bank and Trust Company of Yonkers

250 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

moneys in the account "Saunders Trade School Trustee's Fund", the sum of $4,971.38.

10. That the moneys on deposit in The First National Bank and Trust Company of Yonkers in the account, "Saunders Trade School Trustee's Fund" in the sum of $4,971.38 were public funds.

11. That on Saturday, March 4, 1933, the Governor of the State of New York issued a Proclamation declaring a
251 banking holiday.

12. That the Governor's Proclamation of March 4, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

13. That The First National Bank and Trust Company was solvent on March 4, 1933.

14. That on Monday, March 6, 1933, the President of the United States issued a Proclamation declaring a banking holiday until March 9, 1933.

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15. That the President's Proclamation of March 6, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

16. That The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

17. That on March 9, 1933, the President of the United States issued a Proclamation continuing the Proclamation of March 6, 1933, until further proclamation by the President.

Defendant's Requests for Findings of Fact and Conclusions of Law.

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18. That the President's Proclamation of March 9, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

19. That The First National Bank and Trust Company of Yonkers was solvent on March 9, 1933.

20. That on March 20, 1933, pursuant to Bank Conservation Act of March 9, 1933, the Comptroller of the Currency appointed Percival W. Trudeau Conservator of The First National Bank and Trust Company of Yonkers. 254

21. That The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

22. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers was under the management and control of its own officers.

23. That on March 28, 1933, Percival W. Trudeau, in consideration (1) of the defendant's releasing its lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City, (2) of the defendant's not foreclosing its said lien in the State Courts, (3) of the City's surrendering the said assets so deposited, agreed with the defendant that he would pay out the funds of the defendant remaining on deposit with The First National Bank and Trust Company provided the City would return the bonds deposited with the City as security as the funds were paid out. 255

24. That on March 28, 1933, pursuant to the said agreement between Percival W. Trudeau and the defendant, the City of Yonkers in consideration of said agreement and in reliance thereon surrendered to The First National Bank

and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for defendant's deposits, of the par value of $197,000.

25. That on May 4, 1933, The First National Bank and Trust Company of Yonkers, by and with the consent of Percival W. Trudeau, Conservator, voluntarily paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Saunders Trade School Trustee's Fund," the sum of $4,971.38 upon checks issued by the defendant and signed by the Comptroller and by the Treasurer of the City of Yonkers.

26. That the moneys paid out of the account "Saunders Trade School Trustee's Fund" by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

27. That between March 29, 1933, and January 23, 1934, pursuant to the said agreement between Percival W. Trudeau and the defendant, the City of Yonkers in consideration of said agreement and in reliance thereon surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for the defendant's deposits, of the par value of $337,000. on the dates and in the amounts as follows:

April 3, 1933	$193,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

leaving $1,000 of said bonds in the hands of the City of Yonkers. 259

28. That Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, gave receipts to the City of Yonkers for the securities upon their surrender, each of which receipts contained the following provision:

> "Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers." 260

29. That on July 24, 1933, Louis B. Rossire was appointed Successor Conservator by the Comptroller of the Currency; that on January 23, 1934, the Comptroller of the Currency appointed Arthur E. Muth as Receiver of The First National Bank and Trust Company of Yonkers and on November 15, 1937, the said Comptroller appointed Walter F. Downey, plaintiff herein successor Receiver.

30. That on December 16, 1933, a first dividend of 40 per cent. and on November 3, 1937, a second dividend of 10 per cent. were made available to unsecured depositors of The First National Bank and Trust Company of Yonkers. 261

31. That the defendant was a secured depositor to the extent of deposits in the account "Saunders Trade School Trustee's Fund" in the sum of $4,971.38.

32. That the defendant had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company deposited with the City of Yonkers as security for the deposits of the defendant.

262 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

33. That no claim was ever filed with the City of Yonkers or any officer thereof for the claim alleged in the complaint herein.

34. That no notice of claim and no notice of intention to sue was ever filed with the City of Yonkers or any officer thereof with respect to the claim alleged in the complaint herein.

35. That The First National Bank and Trust Company
263 of Yonkers was solvent at all times prior to January 23, 1934.

36. That all of the moneys paid by The First National Bank and Trust Company of Yonkers to the defendant out of the account "Saunders Trade School Trustee's Fund" were paid while said bank was solvent.

37. That no demand was ever made upon the defendant, the City of Yonkers, its officers or employees for the return of any of the money sued for herein.

264 38. That the Treasurer of the City of Yonkers is and was a person receiving and depositing moneys belonging to the State of New York.

39. That the acts found to have been done by the City of Yonkers were done on behalf of and as agent for the defendant.

CONCLUSIONS OF LAW.

1. That the defendant is entitled to judgment dismissing the complaint with costs.

Defendant's Requests for Findings of Fact and Conclusions of Law. 265

2. That the City of Yonkers was and is a political subdivision of the State of New York, and was and is a city of the Second Class under Chapter 55 of the Laws of 1909 of New York as amended.

3. That the funds deposited by the defendant in the First National Bank and Trust Company of Yonkers in account "Saunders Trade School Trustee's Fund", in the sum of $4,971.38 were public funds.

4. That the Proclamation of the Governor of New York 266
of March 4, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

5. That the Proclamation of the President of the United States of March 6, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

6. That the Proclamation of the President of the United States of March 9, 1933, declaring a bank holiday did not create a presumption that The First National Bank 267
and Trust Company of Yonkers was insolvent.

7. That the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

8. That the appointment of Louis D. Rossire, as successor Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

268 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

9. That solvency is presumed until the contrary is proved.

10. That The First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

11. That the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

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12. That the plaintiff is not entitled to recover deposits of the defendant paid out by The First National Bank and Trust Company of Yonkers prior to its insolvency.

13. That the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

14. That the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendant

270 prior to January 23, 1934.

15. That a conservator of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

16. That a conservator of a national bank appointed by the Comptroller of the Currency is not an officer of the Court.

17. That a receiver of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

Defendant's Requests for Findings of Fact and Conclusions of Law.

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18. That a receiver of a national bank appointed by the Comptroller of the Currency is not an officer of the Court.

19. That the negotiation of a settlement of claims against The First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same was within the scope of the authority of Percival W. Trudeau, as Conservator of said bank.

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20. That the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendant was based upon a good and valid consideration.

21. That the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendant constituted an accord and satisfaction.

22. That the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency.

273

23. That National Banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

24. That the validity, force and effect of the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendant is determined by the laws of New York, the place of making.

274 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

25. That the defendant was entitled to a preference in the payment of its funds upon liquidation of The First National Bank and Trust Company of Yonkers.

26. That under the law of the State of New York state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions thereof, in such banks.

275 27. That The First National Bank and Trust Company was authorized by law to give security for the safekeeping and prompt payment of public funds deposited with it by the defendant.

28. That The First National Bank and Trust Company of Yonkers' depositing assets with the City of Yonkers as security for the defendant's deposits of public funds was lawful.

29. That the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among
276 other deposits, deposits by the defendant in the account, "Saunders Trade School Trustee's Fund" in the sum of $4,971.38 was lawful.

30. That the defendant was a secured depositor of The First National Bank and Trust Company of Yonkers.

31. That if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with the City of Yonkers should serve as security for all of said City's deposits was beyond the powers of the said Bank, the rights and obligations of the plaintiff and defend-

ant arising therefrom are determined by the laws of the State of New York.

32. That in order to repossess itself of the assets, given to secure the deposits of the defendant, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to the defendant.

33. That the payments of deposits on May 4, 1933, to the defendant by the Conservator of The First National 278
Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

34. That the defendant was a creditor of The First National Bank and Trust Company of Yonkers.

35. That the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as security for the indebtedness. 279

36. That the defendant had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City of Yonkers as security for the deposits of the defendant.

37. That this action was not commenced within the time limited by law.

38. That the City of Yonkers is prohibited by law from paying the claim alleged in the complaint.

280 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

39. That the City of Yonkers is prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the claimant, and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller, and shall have been audited and allowed by him.

40. That the City of Yonkers is not liable in a civil action for damages or injuries to person or property, or invasion of personal or property rights, of any name or
281 nature whatsoever, arising at law or in equity, alleged to have been caused or sustained by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the City, or any of its agents, officers or employees, unless a claim therefor in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or on account of which the claim arose, be presented to the common council and served upon the Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall
282 be commenced thereon within one year after the happening of such accident or injury or the occurrence of such act, omission, fault or neglect.

In the event of a denial by the Court of defendant's requests for the foregoing findings of fact and conclusions of law or any part thereof, defendant respectfully requests the Court to grant an exception or exceptions to defendant.

Dated: Yonkers, N. Y., July ...., 1938.

Respectfully submitted,

LEONARD G. MCANENY,
Attorney for defendant.

Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, in Liquidation,

Plaintiff,

v.

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

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L. 64-75.

Appearances:

BENJAMIN W. MOORE, Yonkers, N. Y., for Plaintiff.

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LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y., and MORRIS L. ROSENWASSER and HAROLD T. GARRITY, of Counsel, for Defendant.

KNIGHT, District Judge.

The Court finds with respect to the Defendant's Findings of Fact and concludes as to the Conclusions of Law submitted in this case as follows:

286 *Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law.*

FINDINGS OF FACT.

1. Found.
2. Found.
3. Found.
4. Found.
5. Found.
6. Found.
7. Found.

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8. Found.
9. Found.
10. Refused.
11. Found.
12. Found.
13. Refused.
14. Found.
15. Refused.
16. Refused.
17. Found.

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18. Refused.
19. Refused.
20. Found.
21. Refused.
22. Refused.
23. Refused.
24. Refused.
25. Found.
26. Refused.
27. Refused.
28. Found.

Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law. 289

29. Found.
30. Found.
31. Refused.
32. Refused.
33. Found.
34. Found.
35. Refused.
36. Refused.
37. Found

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38. Refused.
39. Refused.

CONCLUSIONS OF LAW.

1. Refused.
2. Found.
3. Refused.
4. Found.
5. Found.
6. Found.

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7. Refused.
8. Refused.
9. Refused.
10. Refused.
11. Refused.
12. Refused.
13. Refused.
14. Refused.
15. Found.
16. Found.

292 *Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law.*

17. Found.
18. Found.
19. Refused.
20. Refused.
21. Refused.
22. Refused.
23. Refused.
24. Refused.
293 25. Refused.
26. Refused.
27. Refused.
28. Refused.
29. Refused.
30. Refused.
31. Refused.
32. Refused.
33. Refused.
34. Found.
35. Refused.
294 36. Refused.
37. Refused.
38. Refused.
39. Refused.
40. Refused.

July 18, 1938.

JOHN KNIGHT,
United States District Judge.

Filed July 29, 1938.

295

Defendant's Exceptions.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER E. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75.

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Exceptions are allowed the defendant as noted in the stenographic minutes of the trial herein, and to the findings numbered 4, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 contained in the findings of the court, dated July 18, 1938, and to the denial of findings of fact numbered 10, 13, 15, 16, 18, 19, 21, 22, 23, 24, 26, 27, 31, 32, 35, 36, 38 and 39 and to the denial of conclusions of law numbered 1, 3, 7, 8, 9, 10, 11, 12, 13, 14, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39 and 40, as requested by the defendant, this 27th day of October, 1938.

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JOHN KNIGHT,
U. S. D. J.

And the defendant prays that its bill of exceptions may be allowed, settled and signed.

LEONARD G. MCANENY,
Attorney for Defendant.

298 *Order Settling Bill of Exceptions.*

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the bill of exceptions herein contains all the material facts, proceedings, rulings and exceptions thereto occurring upon the trial of this cause and not heretofore a part of the record herein and that the exhibits set forth or referred to constitute all the exhibits offered in evidence at the said trial and that the same may be settled and allowed in the form proposed and submitted and ordered on file as a bill of exceptions herein.

299 Dated, Yonkers, New York, November 17, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff,

LEONARD G. McANENY,
Attorney for Defendant.

Order Settling Bill of Exceptions.

It appearing that the foregoing bill of exceptions contains all of the material facts, matters, things, proceedings, rulings, and exceptions thereto, occurring upon the trial of 300 this cause, and not heretofore a part of the record herein, including all evidence adduced at the said trial, and that the exhibits set forth in the foregoing bill of exceptions constitute all of the exhibits offered in evidence in the said trial.

I hereby settle and allow the foregoing bill of exceptions as a full, true, and correct bill of exceptions in this cause and order the same on file, and further order the clerk of this Court to transmit said entire bill of exceptions to the Circuit Court of Appeals for the Second Circuit.

Dated this 18th day of November, 1938.

JOHN KNIGHT,
U. S. D. J.

301

Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75

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Appearances:

BENJAMIN W. MOORE, Yonkers, N. Y., for Plaintiff.

LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y., MORRIS L. ROSENWASSER, and HAROLD T. GARRITY, of Counsel, for Defendant.

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Hon. JOHN KNIGHT, District Judge:

On March 4, 1933, the Defendant as Trustee of "The Saunders Trade School Fund" had on deposit in the First National Bank and Trust Company of Yonkers, New York, hereinafter referred to as Bank, in a checking account captioned: "Saunders Trade School Trustees Fund Account" the sum of $4,971.38. This fund was deposited with the Bank in accordance with resolution adopted by the Board

of Estimate and Apportionment of the City of Yonkers on July 10, 1929, designating the First National Bank and Trust Company as one of the depositaries for "all moneys of the City received by the City Treasurer of the City of Yonkers." This money was withdrawn on May 4, 1933. This deposit was secured by bonds deposited with it by the Bank, and, after withdrawal of said deposits, the pledged securities were returned to the Bank. The moneys so deposited represented income from the corpus of the Saunders Trust Fund. It is claimed by the defendant that this deposit was a public fund. Whether it was a public or private fund makes no difference with the determination herein. Whether public or private, pledging of securities therefor by the Bank was illegal and *ultra vires*. Save and excepting the question of the nature of the deposit, the material facts are the same as those found in *Downey* v. *City of Yonkers*, this day decided by me. For the reasons therein assigned, Plaintiff is entitled to judgment in the sum of $2,485.69, being the difference between the amount which the Plaintiff should have received as a fifty percent. dividend from the Bank and the amount paid by the Bank to the City on account of the deposit aforesaid, with interest from April, 1936.

Findings of Fact and Conclusions of Law may be submitted, and, when signed, made a part of the decision herein.

June 8, 1938.

JOHN KNIGHT,
United States District Judge.

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Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75.

308

The issues in this action having been regularly brought on for trial before Hon. John Knight, District Judge, on the 5th day of January, 1938 without a jury, and the plaintiff having appeared by Benjamin W. Moore, his attorney, and Milton L. Romm, of counsel, and the defendant having 309
appeared by Leonard G. McAneny, Esq., Corporation Counsel, and Morris L. Rosenwasser, Esq. and Harold T. Garrity, Esq., Assistant Corporation Counsels, and the court having heard the allegations and proofs of the parties and having filed its opinion, dated June 8, 1938, and its findings of fact and conclusions of law, dated July 18, 1938, directing judgment as hereinafter stated, and the costs of the plaintiff having been duly taxed at $50.93.

Now, on motion of Benjamin W. Moore, attorney for the plaintiff, it is

310 *Opinion of Court on Applicability of Rules of Civil Procedure.*

ADJUDGED that the plaintiff, Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, do recover of the defendant, The City of Yonkers, as Trustee under the last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund", the sum of $2,485.69 together with interest thereon in the sum of $382.93 and the sum of $50.93 costs as taxed, making in all the sum of $2,919.55 and that the plaintiff have execution therefor against the defendant, The City of Yonkers, as Trustee under the last Will and Testament of
311 Irvin Saunders, of "The Saunders Trade School Fund". Judgment signed this 5th day of August, 1938.

CHARLES WEISER,
Clerk.

Opinion of Court on Applicability of Rules of Civil Procedure.

The motion in each of these cases for an order limiting
312 exceptions herein pursuant to new Rule 46 is denied. Irrespective of the question of whether new Rule 86 applies to actions in which final judgment had been entered prior to the effective date of the new rules, it is my view that the application of the new rules would not be feasible and work injustice to the defendant.

An order may be submitted to conform with this communication.

JOHN KNIGHT,
U. S. D. J.

313

Order Denying Motion to Apply New Rules on Appeal.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court House thereof in the Borough of Manhattan, City of New York, on the 18th day of October, 1938.

Present:

Hon. JOHN KNIGHT,
District Judge.

314

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75.

315

The defendants having moved this Court for an order invoking the application of the Federal Rules of Civil Procedure to this action with respect to Rule 46 eliminating the necessity for exceptions and Rule 73 eliminating the necessity of assignments of error, and said motion having been submitted by Leonard G. McAneny, Esq., attorney for the defendants, and by Benjamin W. Moore, attorney for the plaintiff, by Milton L. Romm, of counsel,

Now, on reading and filing the notice of motion dated the 20th day of September, 1938, and the affidavit of Leon-

316 *Petition and Order Allowing Appeal.*

ard G. McAneny, thereto annexed, verified the 20th day of September, 1938, in support of said motion, and the affidavit of Benjamin W. Moore, verified the 3rd day of October, 1938, in opposition thereto, it is

ORDERED, that the motion be and it hereby is in all respects denied.

JOHN KNIGHT,
District Judge.

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317 **Petition and Order Allowing Appeal.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

against

318 THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75.

To the Honorable William Bondy, Judge of the District Court, sitting for the Southern District of New York.

Now comes the defendant-appellant, The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

by Leonard G. McAneny, its attorney, and feeling itself aggrieved by the judgment of this Court entered on the 5th day of August, 1938, hereby prays that an appeal may be allowed to it from said judgment, to the United States Circuit Court of Appeals for the Second Circuit, and that citation issue, and, in connection with this petition, petitioner herewith presents its assignment of errors.

Petitioner further prays that an order be made fixing the amount of the bond to be given by defendant for costs, and a proper transcript of the record of proceedings and papers upon which said judgment was made, duly authenti- 320
cated, shall be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated: Yonkers, New York, October 28th, 1938

LEONARD G. MCANENY
Corporation Counsel
Attorney for defendant-appellant

The above appeal is hereby allowed.

Dated: New York, N. Y. October 31st, 1938

321

WM. BONDY,
U. S. D. J.

A bond for costs in the usual form was duly approved and filed in the office of the Clerk of the Court on October 31, 1938.

322 **Assignments of Error and Prayer for Reversal.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,

Plaintiff,

against

323 THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

L. 64-75.

Now Comes the defendant-appellant, The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund", by Leonard G. McAneny, Corporation Counsel, its attor-
324 ney, and submits, presents and files its assignments of error complained of and says:

That in the records and proceedings of the Honorable United States District Court for the Southern District of New York, in a certain action entitled "Walter F. Downey, as Receiver of the First National Bank and Trust Company of Yonkers, New York, Plaintiff, against The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund," Defendant, and in the determination of the issues raised, there is manifest error to the injury and prejudice of the said appellant, and for such error the appellant assigns the following:

Assignments of Error and Prayer for Reversal. 325

1. The said court erred in finding that the bank did not open for business on March 4, 1933 and never afterwards reopened for regular business.

2. The said court erred in finding that no statute of the State of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

3. The said court erred in finding that no statute of the State of New York confers upon state banks the specific power to pledge assets to secure deposits of The City of Yonkers. 326

4. The said court erred in finding that no applicable ordinance or local law of The City of Yonkers confers upon any bank the power to secure deposits of The City of Yonkers.

5. The said court erred in finding that the pledge of assets by the bank to secure the deposits in the account of the Saunders Trade School Trustee's Fund was illegal and *ultra vires*.

327

6. The said court erred in finding that the bank was insolvent as of the 6th day of March, 1933 and that the rights of general creditors of the bank became fixed as of March 6, 1933.

7. The said court erred in finding that the payment by the bank to The City of Yonkers, as Trustee under the Last Will and Testament of Iryin Saunders from the "Saunders Trade Schol Trustee's Fund" account was made with the view to the preference of The City of Yonkers as such Trustee over other creditors of the bank.

328 *Assignments of Error and Prayer for Reversal.*

8. The said court erred in finding that no service of any notice of claim or of intention to sue by the bank through its Receiver was required.

9. The said court erred in finding that the payment from the Saunders Trade School Trustee's Account to The City of Yonkers as such Trustee, was voluntarily made under a mistake of law, but is, nevertheless, recoverable.

10. The said court erred in finding that the plaintiff is
329 entitled to recover the sum of $2,485.69 being the difference between the amount which The City of Yonkers, as such Trustee, should have received under the 50% dividend paid by the bank and the sum of $4,971.38 paid to the defendant together with interest and the costs of this action.

11. The said court erred in finding that the plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $2,982.83 from May 1, 1936 to November 2, 1937 and interest at the same rate on the sum of $2,485.69 from November 3, 1937 to the date of the judgment to be entered herein.

330 12. The said court erred in failing to find that the moneys on deposit in The First National Bank and Trust Company of Yonkers in the account, "Saunders Trade School Trustee's Fund" in the sum of $4,971.38 were public funds.

13. The said court erred in failing to find that The First National Bank and Trust Company was solvent on March 4, 1933.

14. The said court erred in failing to find that the President's Proclamation of March 6, 1933, did not declare

that The First National Bank and Trust Company of Yonkers was insolvent.

15. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

16. The said court erred in failing to find that the President's Proclamation of March 9, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

332

17. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 9, 1933.

18. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

19. The said court erred in failing to find that from March 6, 1933 to March 20, 1933, The First National Bank and Trust Company of Yonkers was under the management and control of its own officers.

333

20. The said court erred in failing to find that on March 28, 1933, Percival W. Trudeau, in consideration (1) of the defendant's releasing its lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City, (2) of the defendant's not foreclosing its said lien in the State Courts, (3) of the City's surrendering the said assets so deposited, agreed with the defendant that he would pay out the funds of the defendant remaining on deposit with The First National Bank and Trust Company provided the City would return the bonds

334 *Assignments of Error and Prayer for Reversal.*

deposited with the City as security as the funds were paid out.

21. The said court erred in failing to find that on March 28, 1933, pursuant to the said agreement between Percival W. Trudeau and the defendant, the City of Yonkers in consideration of said agreement and in reliance thereon surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for
335 defendant's deposits, of the par value of $197,000.

22. The said court erred in failing to find that the moneys paid out of the account "Saunders Trade School Trustee's Fund" by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

23. The said court erred in failing to find that between March 29, 1933, and January 23, 1934, pursuant to the said agreement between Percival W. Trudeau and the defendant, The City of Yonkers in consideration of said agreement and in reliance thereon surrendered to The First National
336 Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for the defendant's deposits, of the par value of $337,000 on the dates and in the amounts as follows:

April 3, 1933	$193,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

leaving $1,000 of said bonds in the hands of The City of Yonkers.

24. The said court erred in failing to find that the defendant was a secured depositor to the extent of deposits in the account "Saunders Trade School Trustee's Fund" in the sum of $4,971.38.

25. The said court erred in failing to find that the defendant had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company deposited with The City of Yonkers as security for the 338
deposits of the defendant.

26. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

27. The said court erred in failing to find that all of the moneys paid by The First National Bank and Trust Company of Yonkers to the defendant out of the account "Saunders Trade School Trustee's Fund" were paid while said bank was solvent.

339

28. The said court erred in failing to find that the Treasurer of The City of Yonkers is and was a person receiving and depositing moneys belonging to the State of New York.

29. The said court erred in failing to find that the acts found to have been done by The City of Yonkers were done on behalf of and as agent for the defendant.

30. The said court erred in failing to make the conclusion of law that the defendant is entitled to judgment dismissing the complaint with costs.

340 *Assignments of Error and Prayer for Reversal.*

31. The said court erred in failing to make the conclusion of law that the funds deposited by the defendant in The First National Bank and Trust Company of Yonkers in account "Saunders Trade School Trustee's Fund", in the sum of $4,971.38 were public funds.

32. The said court erred in failing to make the conclusion of law that the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said
341 bank was insolvent.

33. The said court erred in failing to make the conclusion of law that the appointment of Louis D. Rossire, as successor Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

34. The said court erred in failing to make the conclusion of law that solvency is presumed until the contrary is proved.

35. The said court erred in failing to make the con-
342 clusion of law that the First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

36. The said court erred in failing to make the conclusion of law that the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

37. The said court erred in failing to make the conclusion of law that the plaintiff is not entitled to recover

deposits of the defendant paid out by The First National Bank and Trust Company of Yonkers prior to its insolvency.

38. The said court erred in failing to make the conclusion of law that the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

39. The said court erred in failing to make the conclusion of law that the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendant prior to January 23, 1934. 344

40. The said court erred in failing to make the conclusion of law that the negotiation of a settlement of claims against The First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same was within the scope of the authority of Percival W. Trudeau, as Conservator of said bank.

41. The said court erred in failing to make the conclusion of law that the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendant was based upon a good and valid consideration. 345

42. The said court erred in failing to make the conclusion of law that the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendant constituted an accord and satisfaction.

43. The said court erred in failing to make the conclusion of law that the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency.

44. The said court erred in failing to make the conclusion of law that national banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

45. The said court erred in failing to make the conclusion of law that the validity, force and effect of the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendant is determined by the laws of New York, the place of making.

46. The said court erred in failing to make the conclusion of law that the defendant was entitled to a preference in the payment of its funds upon liquidation of The First National Bank and Trust Company of Yonkers.

47. The said court erred in failing to make the conclusion of law that under the law of the State of New York state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions thereof, in such banks.

48. The said court erred in failing to make the conclusion of law that The First National Bank and Trust Company was authorized by law to give security for the safekeeping and prompt payment of public funds deposited with it by the defendant.

49. The said court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers' deposit of assets with The City of Yonkers, as security for the defendant's deposits of public funds, was lawful.

50. The said court erred in failing to make the conclusion of law that the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among other deposits, deposits by the defendant in the account, "Saunders Trade School Trustee's Fund" in the sum of 350
$4,971.38 was lawful.

51. The said court erred in failing to make the conclusion of law that the defendant was a secured depositor of The First National Bank and Trust Company of Yonkers.

52. The said court erred in failing to make the conclusion of law that if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with The City of Yonkers should serve as security for all of said city's deposits was beyond the powers of the said bank, the rights and obligations of the plaintiff and defendant arising therefrom are determined by the laws of 351
the State of New York.

53. The said court erred in failing to make the conclusion of law that in order to repossess itself of the assets given to secure the deposits of the defendant, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to the defendant.

54. The said court erred in failing to make the conclusion of law that the payments of deposits on May 4, 1933, to the defendant by the Conservator of The First National

Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the Proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

55. The said court erred in failing to make the conclusion of law that the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as security for the indebtedness.

353 56. The said court erred in failing to make the conclusion of law that the defendant had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with The City of Yonkers as security for the deposits of the defendant.

57. The said court erred in failing to make the conclusion of law that this action was not commenced within the time limited by law.

58. The said court erred in failing to make the conclusion of law that The City of Yonkers is prohibited by law
354 from paying the claim alleged in the complaint.

59. The said court erred in failing to make the conclusion of law that The City of Yonkers is prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the claimant, and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller, and shall have been audited and allowed by him.

60. The said court erred in failing to make the conclusion of law that The City of Yonkers is not liable in a civil

action for damages or injuries to person or property, or invasion of personal or property rights, of any name or nature whatsoever, arising at law or in equity, alleged to have been caused or sustained by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the city, or any of its agents, officers or employees, unless a claim therefor in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or on account of which the claim arose, be presented 356
to the common council and served upon the Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall be commenced thereon within one year after the happening of such accident or injury or the occurrence of such act, omission, fault or neglect.

61. The said Court erred in overruling the defendant's objection to the introduction in evidence of Plaintiff's Exhibit 1.

62. The said Court erred in overruling the defendant's objection to the introduction in evidence of Plaintiff's 357
Exhibit 2.

63. The said Court erred in denying the defendant's motion to dismiss the complaint made at the end of the plaintiff's case.

64. The said Court erred in denying the defendant's motion to dismiss the complaint made at the conclusion of the whole case.

358 *Assignments of Error and Prayer for Reversal.*

WHEREFORE, said defendant-appellant respectfully prays:

(1) That the judgment entered in said action be reversed.

(2) That judgment be entered in favor of the defendant with costs in all courts.

(3) That the lower court be directed to enter judgment in favor of the defendant with costs in all courts.

359

(4) That said defendant-appellant have such other, further or different relief as may be just.

Dated: October 28th, 1938.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendant-Appellant.

360

Citation.

361

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75.

362

To Walter F. Downey, as Receiver of the First National Bank and Trust Company of Yonkers, New York, Appellee, and Benjamin W. Moore, his attorney, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit held at Federal Courthouse, in the Borough of Manhattan, City and State of New York, within thirty days from the date hereof, pursuant to an appeal filed in the office of the United States District Court, Southern District of New York, at New York, N. Y., wherein The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund," is appellant and Walter F. Downey, as Receiver of the First National Bank and Trust Company of Yonkers, New York, is appellee, to show cause, if any there be, why the judgment entered herein on the 5th day of August, 1938, should not be corrected and why speedy justice should not be done to the parties in that behalf.

363

WITNESS, the Honorable William Bondy, Judge of the District Court of the United States, sitting for the Southern District of New York, on this 31st day of October, 1938.

WM. BONDY,
U. S. D. J.

364

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,

Plaintiff,

against

365

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

L. 64-75.

To Charles Weiser, Clerk of the United States District Court, Southern District of New York.

Sir:

366 Notice is hereby given that The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund", defendant above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on August 5, 1938.

Dated: New York, N. Y.
October 31, 1938

LEONARD G. MCANENY
Corporation Counsel, Attorney
for Defendant,
Office & P. O. Address
City Hall
Yonkers, New York.

Stipulation and Order Extending Time to File Record. 367

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in Liquidation,

Plaintiff;

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

L. 64-175. 368

WHEREAS, an appeal was allowed the defendant herein on the 31st day of October, 1938, and

WHEREAS, the time of the said defendant to docket this case and file the transcript of record on appeal herein with the Clerk of the United States Circuit Court of Appeals for the Second Circuit will expire on November 30, 1938, now 369 therefore,

IT IS STIPULATED AND AGREED, by and between the parties hereto that the time of the defendant to docket this case and file the transcript of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938 and an order to this effect may be entered by either party without notice.

Dated: Yonkers, New York, November 23, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendant.

70 *Stipulation and Order Extending Time to File Record.*

On reading and filing the foregoing stipulation, it is

ORDERED, that the time of the defendant to docket the above entitled case and file the transcript of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938.

Dated: New York, N. Y., November 23, 1938.

CHARLES WEISER,
71 Clerk, U. S. District Court,
Southern District of New York

72

Stipulation and Order Settling Record.

373

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in Liquidation,

Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

L. 64-175.

374

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true copy of the transcript of the record of the District Court in the above entitled matter as agreed upon by the parties.

Dated: Yonkers, New York, November 29, 1938.

375

BENJ. W. MOORE
Attorney for Plaintiff.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendant.

On reading the foregoing stipulation, it is

ORDERED, that the foregoing printed record be filed in lieu of the original appeal papers for the purpose of certifying a record on appeal.

Dated: New York, N. Y., December 3rd, 1938.

VINCENT L. LEIBELL,
U. S. D. J.

376

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

377 *against*

L. 64-75

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

I, Charles Weiser, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the printed transcript of the record of the said District
378 Court in the above entitled matter.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York this 5th day of December, in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundredth and sixty-third year.

CHARLES WEISER,
Clerk.

(SEAL)

379

Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff-Appellee,

against

THE CITY OF YONKERS,

Defendant-Appellant.

No. 230.

380

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff-Appellee,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants-Appellants.

No. 231.

381

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff-Appellee,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants-Appellants.

No. 232.

382 *Opinion.*

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders of "The Saunders Trade School Fund",
Defendant-Appellant.

No. 233.

383 Before:

L. HAND, AUGUSTUS N. HAND and CHASE,
Circuit Judges.

Appeals from the United States District Court for the Southern District of New York.

From judgments in the several actions above-named that the Receiver of the First National Bank & Trust Company of Yonkers in Liquidation recover of the respective defendants therein fifty per cent. of certain moneys paid
384 out by the Bank between March 8, 1933 and January 23, 1934, inclusive, on checks drawn on behalf of the various defendants, the latter appeal. Affirmed.

LEONARD G. MCANENY, Corporation Counsel, for Defendants-Appellants; LEONARD G. MCANENY, E. J. DIMOCK, MORRIS L. ROSENWASSER, J. DONALD RAWLINGS and HAROLD T. GARRITY, Counsel.

BENJAMIN W. MOORE, Attorney for Plaintiff-Appellee; BENJAMIN W. MOORE and MILTON L. ROMM, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

The legal principles applicable to Action No. 230 against the City of Yonkers are determinative of the issues in the other three cases which need not, therefore, be separately discussed.

This is an action by the receiver of The First National Bank & Trust Company of Yonkers (herein called the Bank) against The City of Yonkers (herein called the City) to recover fifty per cent. of certain money paid out by the Bank, between March 8, 1933, and January 23, 1934, inclusive, on the checks of the City. Since September 30, 1929, the Bank has been a national banking corporation organized and existing under the laws of the United States and the City a municipal corporation organized and existing by virtue of the laws of the State of New York. 386

On March 4, 1933 the City had funds on deposit in checking accounts in the Bank as follows:

(1) Treasurer of the City	$275,105.53
(2) City of Yonkers	1,502.84
(3) Nepperhan Sewer Fund of City of Yonkers	621.88

387

On March 4, 1933, the Governor of the State of New York proclaimed a bank holiday, and on March 6, 1933 the President of the United States proclaimed a bank holiday which was extended by further proclamation on March 9, 1933 and ratified by Congress on the latter date. The Bank never reopened for regular business after March 4, 1933 but operated under restrictions imposed by the Secretary of the Treasury until a Conservator was appointed. On March 20, 1933 the Comptroller of the Currency appointed a Conservator of the Bank and on Janu-

ary 23, 1934, appointed a receiver in liquidation. A dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 3, 1937.

On March 4, 1933, the City held various bonds having a par value of $535,000 which had been delivered to it by the Bank as security for the above three accounts, among others. These bonds, to the amount at par of $534,000, were later returned in connection with withdrawals from the accounts.

By a series of withdrawals beginning on March 8, 1933 and ending on January 23, 1934, the City withdrew almost all of the balance in each of the three accounts as follows:

1. Account with Treasurer of City		$275,105.53
Withdrawals:		
March 8 to March 19	$ 89,226.06	
March 20 to March 27	67,735.99	
March 28 on	118,016.99	
Total		274,979.04
2. Account with City of Yonkers		$ 1,502.84
Withdrawals:		
May 23 to July 21, 1933		1,502.84
3. Account with Sewer Fund		$ 621.88
Withdrawals:		
May 4, 1933		621.88

The complainant seeks to recover fifty per cent. of the above withdrawals on the ground that they constituted an unlawful preference within Sections 91 and 194, U. S. C. A., of the National Bank Act.

If the pledge of bonds to secure the deposits was authorized by the National Bank Act it is clear that the City had a valid lien on the bonds to the extent of its deposits and this action by the receiver must fail. *Lewis* v. *Fidelity Deposit*, 292 U. S. 559; *McNair* v. *Knott*, 302 U. S. 369. It is likewise settled that national banks have no implied power to pledge assets to secure either private or 392
public deposits, *Texas & Pac.* v. *Pottorff*, 291 U. S. 245; *Marion* v. *Sneeden*, 291 U. S. 262. Express authority for the pledge made in this case depends upon whether the requirements of the Act of June 25, 1930, 12 U. S. C. A., §90, have been met. That section provides that:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." 393

The purpose of the Act of June 25, 1930 was to equalize the positions of national and state banks in competing for deposits, and is in line with a long series of acts, beginning in 1864, designed to apply the policy of equalization: *Lewis* v. *Fidelity Co.*, 292 U. S. 559, at 564-65.

It is conceded that there was no express statutory authority in New York authorizing state banks to give security for these deposits during the times involved. In the absence of express enabling statutes state banks in New York are not authorized to pledge assets to secure either private or public deposits, and it is the duty of the

Superintendent of Banks to compel them to recover any assets so pledged upon the return of the deposits when demanded. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, at 187-88. As was said by Judge Finch in his opinion in *City of Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, 406: "No question remains that this pledge by the defendant securing the deposit (of public money) was *ultra vires* as to both parties." So far as the Act of June 25, 1930, may be thought to require an authorization of state banks to make pledges as a prerequisite for pledges by national banks it does not apply here.

But the law of New York is that pledges by state banks to secure deposits, even though *ultra vires*, may not be set aside until the deposits have been repaid in full, whether or not insolvency has intervened. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175; *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400. The parties concede that the law of New York with respect to the effect of an *ultra vires* pledge does not bring the pledges here within the Act of June 25, 1930. The policy of the statute would appear to lead to the same conclusion. The Act was designed to equalize competition for public deposits and it does not appear to give national banks authority to do what the state banks are forbidden to do and what the State Superintendent of Banks is under a duty to undo. The banks of the State could not give security in a case like this without violating their charters; Congress could not have intended to meet that type of competition. The use of the term "authorized" in the Act accords with this view; a pledge which is "*ultra vires*" cannot be said to be "authorized".

The City argues, however, that the pledge made by the national bank in this case, even though not authorized and outside the scope of its charter powers, should be given the same effect as State law gives to similar pledges by State banks. Such a result would be contrary to the result reached in *Texas & Pac. Ry.* v. *Pottorff*, 291 U. S. 245, and

Marion v. *Sneeden*, 291 U. S. 262, in which the Court held that a national bank might recover assets which had been pledged to secure deposits even though the depositor would not be paid in full because of supervening insolvency of the bank.

The City says that these decisions are not controlling because in neither did it appear that the law of the State where the transaction occurred gave any different effect to an *ultra vires* pledge by a bank than that given under the federal law. Nevertheless both decisions make it plain, that, unless the right to pledge is expressly granted by a federal statute, a pledge to secure deposits in national banks is wholly unauthorized and, as Justice Brandeis said in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 255: 398
"To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets. . . . This policy of equal treatment was held to preclude, in case of a national bank, even the preference under §3466 of the Revised Statutes which otherwise is accorded to the United States when its debtor becomes insolvent. *Cook County National Bank* v. *United States*, 107 U. S. 445. The effect of a pledge is to withdraw for the benefit of one depositor 399
part of the fund to which all look for protection."

It is true that in spite of the foregoing general policy of the Act, Congress has seen fit to permit national banks to give security to depositors "of the same kind as is authorized by the law of the State", but it seems unreasonable to suppose that the general policy of the National Bank Act to prevent preferences is to be so limited as to permit hypothecations of assets that do not strictly fall within the statutory exceptions to a sound general rule requiring equal distribution of the assets of insolvent banks among all depositors. As we have already said the words

"authorized by the law of the State" plainly relate to the authority of state banks under their charters and not to the effect to be given to their *ultra vires* acts. Under the law of New York, as it existed at the time the Bank became insolvent, there can be no doubt that the pledges were unauthorized. In *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, and *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, the Court of Appeals held that enforcement of the law prohibiting pledges to secure deposits lay with the State Superintendent of Banks who, under his statutory powers, should be alert to prevent such pledges
401 and to undo them prior to the occurrence of insolvency. The Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, evidently felt that the supervisory power of the Comptroller of the Currency was not enough to insure adequate enforcement of the policy to prevent pledges but that they should be treated by the courts as wholly void. The question of the right of a national bank to pledge its assets to secure depositors and the effect to be given to such a pledge when once made are both clearly matters of national concern. The rule in some of the states (including New York) that a bank is estopped to rescind a pledge to a
402 depositor until he is paid in full is directly in the face of the policy attributed to the National Bank Act in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262. In this connection see *Merchants' National Bank* v. *Wehrmann*, 202 U. S. 295; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 372; *California Bank* v. *Kennedy*, 167 U. S. 362.

The rationale of the two cases cited from the New York Court of Appeals appears to be that a banking corporation organized under the laws of the State has certain actual powers outside the powers authorized by its charter and that its exercise of such *ultra vires* powers may create an estoppel not only against the corporation itself but also

against its general creditors. The measure of the powers of a national bank, on the other hand, is the statutory grant and powers not conferred by Congress are denied. The Act under which national banks are organized constitutes a complete system for their government. *Cook County Nat. Bank* v. *United States*, 107 U. S. 445, 448; *California Bank* v. *Kennedy*, 167 U. S. 362. The decision of the Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 260-61, is based upon a holding that a national bank cannot exercise powers not granted so as to erect an estoppel against the general creditors for whose benefit the 404
limitation of powers was imposed. See *Concord First National Bank* v. *Hawkins*, 174 U. S. 364. If the problem here be viewed as depending upon the powers which a national bank can exercise it seems clear that the extent of its powers must be determined by an interpretation of the federal statute in the light of the policy therein expressed and that views of state courts on the powers of local corporations have no relevance except as Congress expressly makes them applicable. For the foregoing reasons the plaintiff receiver who represents the general creditors is not estopped to set aside the pledge that was made in this case.

405 The holding in *Willing* v. *Binenstock*, 302 U. S. 272, and *Scott* v. *Armstrong*, 146 U. S. 499, 510, that a setoff, allowed under the common law of a State to an insolvent bank is not objectionable as a preference, does not militate against avoiding the pledges here. The transactions in those cases were ones which the banks were authorized to make and the state law was followed because it did not conflict with the policy of the Bank Act. It is one thing to sanction a general rule of law which allows a depositor to set off his deposit against his indebtedness, it is another thing to sanction a preference based on a transaction forbidden by the Act.

406 *Opinion.*

While a national bank in some cases may be under a duty to return benefits it has received as the result of an *ultra vires* transaction (see *First National Bank* v. *Mott Iron Works*, 258 U. S. 240; *Citizens National Bank* v. *Appleton*, 216 U. S. 196), the rule if applicable here would not help the defendant since it would not be entitled to a preference against the other depositors of the insolvent bank in the absence of tracing a specific *res*. *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 261; *cf. Rankin* v. *Emigh*, 218 U. S. 27. It is well settled that the distribution
407 of the assets of an insolvent national bank is governed by federal law and that state laws which attempt to create preferences which arise at the time of insolvency are to be disregarded. *Old Company's Lehigh, Inc.* v. *Meeker*, 294 U. S. 227; *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216; *Davis* v. *Elmire Savings Bank*, 161 U. S. 275.

The City claims that the payments to it prior to the Conservatorship were not made "after the commission of an act of insolvency, or in contemplation thereof * * * with a view to the preference of one creditor to another * * *". The Bank was closed from March 4, 1933
408 to March 6, 1933 under proclamations by the Governor of New York and the President of the United States. Later it was permitted to operate under restrictions imposed by the Secretary of the Treasury. On March 20 a Conservator was appointed with the powers of a receiver as provided in 12 U. S. C. A., §203. On January 23, 1934, the Comptroller of the Currency on a finding of insolvency appointed a receiver. The Bank never opened for regular business after March 4, 1933. No attempt was made by the appellants to show any change in the Bank's condition after March 4, 1933. We hold that the facts indicated that the Bank would not be able to pay its depositors in due course and the trial court could properly draw the inference that the pay-

ments were in violation of 12 U. S. C. A., §91. See *Dehne* v. *Mine Safety Appliance Co.*, 94 F. (2d) 956 (C. C. A. 3); *cf. Kullman* v. *Wooley*, 83 F. (2d) 129 (C. C. A. 5); *Willing* v. *Evetoff*, 94 F. (2d) 344 (C. C. A. 3); *Hardee* v. *Washington Loan & Trust Co.*, 91 F. (2d) 314 (App. D. C.).

The payments made by the Conservator were recoverable on still another theory because made out of the assets of an insolvent under a mistake of law. *LaParr* v. *City of Rockford, Ill.*, 100 F. (2d) 564 (C. C. A. 7); *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 152 (App. D. C.), aff'd. 297 U. S. 383. For the foregoing reasons the judgments in the four cases on appeal are affirmed. 410

411

412 **Order for Mandate.**

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of August, one thousand nine hundred and thirty-nine.

Present:

413 Hon. LEARNED HAND,
Hon. AUGUSTUS N. HAND,
Hon. HARRIE B. CHASE,
Circuit Judges.

WALTER F. DOWNEY, Receiver, etc.,
Plaintiff-Appellee,
vs.
THE CITY OF YONKERS, as Trustee, etc.,
Defendant-Appellant.
No. 233.

414

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

IT IS FURTHER ORDERED that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver, etc.,

vs.

CITY OF YONKERS, as Trustee, etc.

ORDER FOR MANDATE.

United States Circuit of Appeals,
Second Circuit,
Filed Aug. 22, 1939,
D. E. ROBERTS, Clerk.

418

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 139, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

419

WALTER F. DOWNEY, Receiver, etc.,

Plaintiff-Appellee,

against

THE CITY OF YONKERS, as Trustee, etc.,

Defendant-Appellant.

as the same remain of record and on file in my office.

420

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighteenth day of September, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-fourth.

[SEAL]

D. E. ROBERTS,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly-certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
NOV 20 1939
CHARLES ELMORE CROPLEY
CLERK

No. 542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

THE CITY OF YONKERS,

Petitioner,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

E. J. DIMOCK,
Counsel for Petitioner.

LEONARD G. MCANENY,
J. DONALD RAWLINGS,
Of Counsel.

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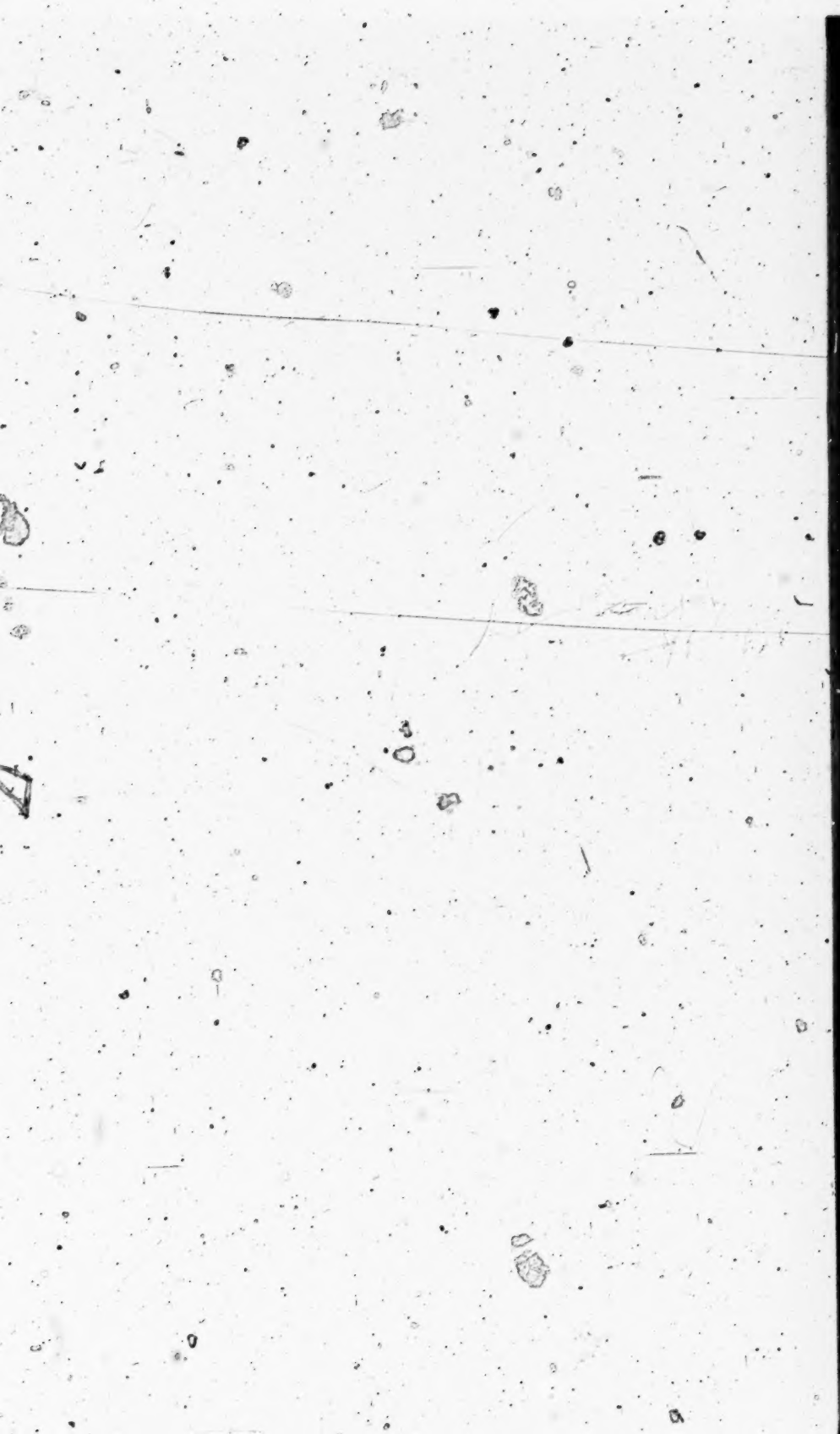

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No.

THE CITY OF YONKERS,
Petitioner,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The City of Yonkers prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on August 22, 1939.

Opinion Below.

The opinion of the United States District Court for the Southern District of New York is reported in 23 Fed. Supp. 1018 (R. 187-196). The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 106 F. 2d 69 (R. 224-234).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 22, 1939 (R. 235). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Presented.

The questions presented by this petition are two:

1. Whether the effect of an *ultra vires* pledge made by a national bank in New York to secure a deposit is determined (a) by the rule in the federal courts that the bank need not repay the deposit in order to obtain the return of the pledged securities or (b) by the rule in the New York courts that the bank must repay the deposit in order to obtain this return.

2. Whether payments made by a bank to a depositor in accordance with the Presidential Proclamation after the banking holiday of March 6, 1933, but before the bank was taken over by the Comptroller of the Currency, can be recovered as preferential without any proof that the payments were made after the commission of an act of insolvency or in contemplation of insolvency, or proof that the payments were made with the intent of creating a preference.

Statutes and Proclamations Involved.

The statutes and proclamations involved are set out in Appendix *infra*, pages 33 to 41.

Companion Actions.

At about the time this action was instituted in the District Court, the Receiver instituted similar actions against the Trustees of the Police Pension Fund of the City of

Yonkers, the Trustees of the Firemen's Pension Fund of the City of Yonkers, and The City of Yonkers, as Trustee of the "Saunders Trade School Fund". All four of the actions were tried separately, but in immediate succession. Appeals to the United States Circuit Court of Appeals for the Second Circuit were taken in all four actions simultaneously, and the appeals argued at the same time, the Court handing down one opinion bearing the caption of all four actions (R. 224). Petitions to this Court for a writ of certiorari are being made simultaneously in each of the four actions, the other three petitions being entitled

"Joseph F. Loehr, Mayor; James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, Petitioners, against *Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,"* October Term, 1939, No. 543,

"Joseph F. Loehr, Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, Petitioners, against *Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,"* October Term, 1939, No. 544, and

"The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of 'The Saunders Trade School Fund', Petitioner, against *Walter F. Downey, as Receiver of The First National Bank and Trust Company of Yonkers, New York"* October Term, 1939, No. 545.

Statement.

On July 10, 1929, the Board of Estimate and Apportionment of The City of Yonkers adopted a resolution designating certain banks as depositaries for all moneys of the City, and directing the City Treasurer to procure adequate

security for all moneys deposited by him in such banks, securing the City of Yonkers against any loss of the moneys deposited and prescribing rates of interest on the general accounts which must be received (R. 154). On September 30, 1929, The First National Bank and Trust Company of Yonkers was formed by merger of three of the depositaries named in the Resolution (R. 40, 161, 164).

On June 25, 1930, the so-called National Bank Enabling Amendment (12 U. S. C. 90, 46 Stat. 809) took effect. It provided:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State, in which such association is located in the case of other banking institutions in the State."

The banking practice and the accepted view of the law as to such pledges at the time of the passage of the Enabling Amendment and thereafter appear in the following quotation from the opinion of this Court written by Mr. Justice Black in *McNair* v. *Knott*, 302 U. S. 369, 371 (1937):

> "For many years Comptrollers of the Currency assumed that National banks had power to give security for public deposits and approved the practice of the banks in pledging such security. It has been, and is now, the policy of most states to require security for public funds whether deposited in State or National banks. The weight of judicial authority in the state courts has supported the doctrine that banks could pledge security for public deposits, but not for private deposits."

On February 28, 1933, the Court of Appeals of the State of New York handed down an opinion in *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, which held that a pledge

by a state bank to secure a deposit was *ultra vires* but that the assets pledged could not be recovered without repaying the deposit.

On March 4, 1933, The City of Yonkers had on deposit in the Bank funds in the sum of $275,105.53, in an account entitled "Treasurer, City of Yonkers", (R. 94, 164), and in the sum of $1,502.84, in an account entitled "City of Yonkers", (R. 141, 164), and in the sum of $621.88, in an account entitled "Nepperhan Sewer Fund, City of Yonkers", (R. 142, 164). On that day, The City of Yonkers held bonds having a par value of $535,000 which had been pledged with it in accordance with the Resolution, as security for the deposits in the above accounts, as well as for the deposits in the accounts involved in the three companion actions (R. 70, 152, 153, 164).

The Governor of the State of New York proclaimed Saturday, March 4th, and Monday, March 6th, banking holidays (R. 85), and on March 6th, the President and the Governor declared a banking holiday to and including Thursday, March 9th (R. 87). During this period and up to March 20, 1933, The First National Bank and Trust Company was under the management and control of its own officers, but under restrictions imposed upon it and all other banks (R. 31). While the Bank was under the control of its officers and before the appointment of a Conservator, payroll checks issued by The City of Yonkers, aggregating $89,226.06, were honored and paid out of the largest account by the Bank (R. 166).

On March 20, 1933, the Comptroller of the Currency appointed a Conservator of the Bank. Between March 20, 1933, and March 28, 1933, payroll checks issued by the City of Yonkers aggregating $67,735.99 were honored and paid out of the largest account (R. 167, 181).

On March 28, 1933, the Conservator and the City agreed that the bank would repay the deposits to the City if the City would surrender the pledged assets. By various withdrawals of deposits from the three accounts aggregating

$120,241.71, and surrenders of securities of a par value of $534,000, this agreement was carried out, making a total of $277,103.76 of deposits withdrawn from the accounts (R. 72, 155-158, 168, 169, 170, 171, 181, 182).

On February 5, 1934, after all of these withdrawals and surrenders, the United States Supreme Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, held that a pledge by a national bank to secure a deposit was *ultra vires* and that the receiver of the bank could recover the pledged assets without paying back the deposits.

Thereafter this action and the three companion actions were brought by a Receiver who had succeeded the Conservator of the First National Bank and Trust Company of Yonkers (R. 83, 84) to recover the deposits which the Bank had paid out on payroll checks and the deposits which the Conservator had paid out in exchange for the pledged assets in so far as such deposits exceeded the 50% dividend to which the City would have been entitled as an unsecured depositor.

The cases were tried before a Judge in the United States District Court for the Southern District of New York, a jury having been waived by stipulation on the record (R. 27, 28).

If the law as laid down by the New York State courts governed the consequences of the pledge either by its own force or by adoption by the federal statute, the repayment of the deposits and the return of the pledged securities was in strict accordance with the rights of the parties so that the plaintiff could not succeed.

If, however, the law as stated in the federal courts were applicable to the consequences of the pledge, the Conservator had overpaid the City when he paid out the deposits in full and recovered the pledged securities.

Even if the repayment of the deposits had not been justified by the existence of the pledge, the Receiver could not recover without proof that the payments by the Bank were made after the commission of an act of insolvency,

or in contemplation of insolvency, or proof that the payments were made with the intent to prefer the City over other creditors.

The District Court (R. 184) refused to find as Conclusions of Law that if the pledge was *ultra vires* the rights and obligations of the parties were determined by the laws of the State of New York (No. 33, R. 177) and that in order to recover the pledged assets it was necessary to repay the deposits in full (No. 34, R. 177), and that under the law of the State of New York state banks were "authorized" to give security in the case of public deposits (No. 28, R. 176).

The District Court found as a Conclusion of Law (No. 4, R. 173) that the Proclamation of March 6, 1933, did not create a presumption that the Bank was insolvent, but the court nevertheless found as a fact (No. 2, R. 159) that it was insolvent on that day.

Judgment was entered for $138,551.88, representing fifty per cent. of the moneys withdrawn after March 4, 1933, plus interest thereon from May, 1936, in the sum of $21,344.71, or a total of $159,970.74 including costs (R. 197, 198).

The City excepted (R. 185) and assigned error on appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 210, 209, 203). The latter affirmed the judgment of the District Court (R. 235).

The City argued in the Circuit Court of Appeals that the New York State common law controlled the consequences of the pledge under *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), because the National Bank Act (unless it incorporated the state law by reference) made no provision as to the effect of an *ultra vires* pledge of assets to secure a deposit, and, as held in *National Bank* v. *Commonwealth*, 9 Wall. 353 (1869), there was no federal common law of national banking.

The Circuit Court of Appeals denied the validity of one of the necessary steps in that argument by holding that the National Bank Act did in effect make provision as to the

consequences of an *ultra vires* pledge of assets to secure a deposit. It held (R. 231) that the matter was one of national concern and that the New York rule was directly in the face of the National Bank Act. It also held that the Enabling Amendment of the National Bank Act did not incorporate the New York state law by reference because a pledge, which only existed because of the power of a New York state bank to accept the liabilities and rights thrust upon it as a consequence of the attempted exercise of a disapproved power, could not be said to be "authorized" (R. 229).

On the second point in the case, the City's claim that, because of the absence of proof of the commission of any act of insolvency or contemplation of insolvency or intent to prefer the City over other creditors, the receiver could in no event recover the payments made before the Comptroller of the Currency took over the bank, the Circuit Court of Appeals held that the fact that the bank never opened for business between the day of the Presidential Proclamation and its final receivership and that no attempt was made by the City to show any change in its condition after that date were sufficient to indicate insolvency at the time of the Proclamation (R. 233).

Specification of Errors to Be Urged.

The court below erred in holding:

1. That the question of the consequences of the *ultra vires* pledge was governed by the decisions of the federal courts rather than the New York courts.

2. That the consequences of the *ultra vires* pledge were fixed by the policy of the National Bank Act.

3. That the so-called Enabling Amendment of the National Bank Act did not adopt the decisions of the New York courts as fixing the consequences of the *ultra vires* pledge.

4. That the mere closing of the bank in the universal banking holiday under the Presidential proclamations, coupled with the taking over of the bank by the Comptroller prior to the close of the banking holiday, is evidence that the bank committed an act of insolvency, or contemplated insolvency or intended to prefer the City over other creditors, prior to the date that the Comptroller took over the bank, within the meaning of §91 (12 U. S. C.).

A word should be said with respect to the holding by the Circuit Court of Appeals (R. 254) that the payments made by the Conservator (as distinguished from those made by the Bank) could be recovered because made by a public official under a mistake of law. This ground for recovery does not exist unless there is a mistake of law, and if, as the City contended, the New York law applied, the payments instead of being made under a mistake of law were made in strict accordance with law.

Reasons for Granting the Writ.

As more fully appears from the annexed brief, the writ of *certiorari* should be allowed because:

I. (a) The judgment of the Circuit Court of Appeals in holding that the policy of the National Bank Act fixed the consequences of an *ultra vires* pledge, decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States, and decided it in a way which is probably in conflict with the decisions of this Court that state laws operate "upon the dealings and contracts of national banks" except where "they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States" (*McClellan* v. *Chipman*, 164 U. S. 347, 357 (1896); see also *National Bank* v. *Commonwealth*, 9 Wall. 353, 362, *supra*; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275 (1896));

(b) Even if the Circuit Court of Appeals were right in holding that the power to accept the consequences of an *ultra vires* act was a matter of the statutory authority of national banks under the National Bank Act, the judgment of that court in holding that no *ultra vires* power, even though effective under state law, could be said to be "authorized" within the meaning of that term as used by the Enabling Amendment to the National Bank Act, decided an important question of federal law which has not been, but should be, settled by this Court;

(c) The failure of the Circuit Court of Appeals to decide one of these two questions in favor of the application of the state law has resulted in a situation where the City of Mount Vernon has obtained security for its deposits from a state bank and been permitted by the New York Court of Appeals to recover its deposits in full upon insolvency (*City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400 (1936)), while the petitioner, the neighboring City of Yonkers, in a precisely similar relationship to a national bank, has been held in this case to be a general creditor only, all in conflict with the traditional desire of Congress to enable the national banks to compete upon a footing of equality with the state banks (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564 (1934)). We know of two other municipalities in the State of New York which obtained pledges from national banks to secure their deposits, and their cases and probably those of many others depend upon the decision in the case at bar.

II. a. The determination of the Circuit Court of Appeals in affirming so much of the judgment of the District Court as allowed the receiver to recover 50% of deposits paid prior to the time the Comptroller took over the Bank is opposed to and in conflict with

(1) The determination of this Court that to recover payments as preferential under § 91 (12 U. S. C.), a find-

ing of insolvency is insufficient in the absence of proof that the payments were made after an act of insolvency or in contemplation thereof with a view to prefer one creditor to another. *McDonald* v. *Chemical National Bank*, 174 U. S. 610 (1899); *Earle* v. *Carson*, 188 U. S. 42 (1903);

(2) The determination of the Circuit Courts of Appeals for the Fifth and Third Circuits that the closing of the bank pursuant to the Presidential Proclamation declaring a banking holiday is not an act of insolvency under which payments made thereafter are preferential. *Kullman & Co.* v. *Woolley*, 83 F. 2d 129 (5th, 1936); *Richman* v. *First Methodist Episcopal Church*, 76 F. 2d 344 (3rd, 1935);

(3) The determination of the Circuit Court of Appeals for the Third Circuit that the burden of proving that a transaction is in violation of § 91 is upon the receiver. *Collins* v. *School District of Borough of Trafford*, 72 F. 2d, 339 (C. C. A. 3rd, 1934);

b. The District Courts and Circuit Courts throughout the country are not in accord as to whether claims against a national bank in liquidation after the banking holiday of 1933 should be resolved as of the date of the Presidential Proclamation or as of the date on which the Comptroller of the Currency took over the Bank through a Conservator. A final determination as to which of these dates controls should be made by this Court to establish uniformity in the decisions in the courts throughout the country.

Bryce v. *National City Bank of New Rochelle*, 93 F. 2d 300 (C. C. A. 2nd, 1937);

Richman v. *First Methodist Episcopal Church*, 76 F. 2d 344 (C. C. A. 3rd, *supra*); cert. den. 296 U. S. 593;

Schram v. *Clair*, 28 F. Supp. 422 (E. D. N. Y., 1939);

Ward v. *Simon*, 23 F. Supp. 117 (E. D. Pa., 1938);

Pyne v. *Jackman*, 12 F. Supp. 653 (S. D. N. Y., 1934);
Aufderheide v. *Mine Safety Appliance Co.*, 9 F. Supp. 918 (W. D. Pa., 1934);
Sadlier v. *Lay*, 222 Misc. 641; 269 N. W. 555 (Sup. Ct., 1936);
Goess v. *Myers*, 134 Pa. Super. 272; 4 A. 2d, 184 (Sup. Ct. Pa., 1939);
Willing v. *Argosy Building & Loan Ass'n.*, 19 F. Supp. 353, at page 354 (E. D. Pa., 1937);
Hardee v. *Washington Loan & Trust Co.*, 91 F. 2d 314 (C. C. A. D. C., 1937);
Dehne v. *Mine Safety Appliance Company*, 94 F. 2d 956 (C. C. A. 3rd, 1938);
Willing v. *Eveloff*, 94 F. 2d 344 (C. C. A., 3rd, 1938); cert. denied 305 U. S. 611.

Conclusion.

The petition for review on Writ of Certiorari should be granted.

Respectfully submitted,

E. J. Dimock,
Counsel for Petitioner.

November 18, 1939.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No.

THE CITY OF YONKERS,
Petitioner,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

POINT I.

Even though the Bank was insolvent, the City was entitled to hold the security until payment of its deposits in full. Since that is just what the City did, the deposits cannot be recovered from it.

a. The Common Law of the State of New York by its own Inherent Force Controls the Consequences of the Pledge.

It is the common law of the State of New York that a pledge by a state bank to secure a deposit is *ultra vires* but the assets pledged cannot be recovered by the bank without repaying the deposit (*State Bank of Commerce* v. *Stone*, 261 N. Y. 175 (*supra*). In *Texas & Pacific Ry. Co.* v. *Pot-*

torff, 291 U. S. 245 (*supra*), this Court held that such a pledge by a national bank was likewise *ultra vires* but that the assets pledged could be recovered without repaying the deposit, "in the absence of an identifiable *res* and a constructive trust based on special circumstances of misconduct" (p. 261).

The position of the City is, and was in the courts below, that the National Bank Act (unless it incorporates the state law by reference) makes no provision as to the effect of an *ultra vires* pledge of assets to secure a deposit, that there is no federal common law of national banking and that therefore we must look at the law of the state where the transaction took place to ascertain the effect of an *ultra vires* pledge—first, at its statute law, and, second, in the absence of statute law upon the subject, at its common law. This last step, resort to state common law in federal court litigation rather than to federal common law, is based upon the recent decision of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (*supra*), which overruled *Swift* v. *Tyson*, 16 Pet. 1 (1842).

The District Court brushed this argument aside, saying (fol. 583):

> "The instant case does not come within the purview of *Erie Ry. Co.* v. *Harry J. Tompkins*, decided April 25, 1938, unreported. The regulation of the conduct of federal banks is peculiarly in the power of the federal government."

The Circuit Court of Appeals took the same position. It attempted to avoid the fundamental proposition of our argument that the federal statute was silent on the subject, by saying (R. 231) that the decision of the Supreme Court in *Texas & Pacific Ry Co.* v. *Pottorff*, 291 U. S. 245, 260, 261 (*supra*), was based upon an interpretation of the National Bank Act as prohibiting a depositor from retaining, until his deposit was repaid, securities which had been pledged to him *ultra vires*.

We do not agree with the court below that the United States Supreme Court, in the *Pottorff* case, when it refused to give any effect to the *ultra vires* pledge, was construing the National Bank Act. It was applying "federal common law". Mr. Justice Brandeis was very careful to divide his opinion into three parts, preceded by three ordinal numerals in italics. *First*, came the question of *ultra vires*, and it was there (p. 253) that he discussed the policy of other provisions of the statute with respect to ratable distribution in insolvency as forming a basis for the conclusion that the pledging of assets to secure deposits was *ultra vires*. In the *second* point (p. 260), he held that the circumstances under which the pledge had been made in that case did not create an estoppel, and in the *third* point (p. 261), he held that the *ultra vires* pledge did not result in the consequence that the depositor might hold the pledged assets until his deposit was repaid because an identifiable *res* and a constructive trust based on special circumstances were essential. In neither the second nor the third points was a word said about the policy of the statute. The New York case (*State Bank of Commerce* v. *Stone*, 261 N. Y. 175, *supra*) was simply cited as *contra* with no attempt to distinguish the *Pottorff* case as one construing a statute. The cases cited as supporting the result reached were not limited to decisions under the National Bank Act but were on the general subject of the effect of an *ultra vires* act. The last two points were decided as a matter of *federal common law* in the absence of a state statute which, even before the decision of *Erie R. R. Co.* v. *Tompkins*, would have been controlling under the familiar rule that, while the law of incorporation determines whether or not a transaction is *ultra vires*, the law of the place of the *ultra vires* transaction determines its effect.

That rule is well stated in the Restatement of the Law of Conflict of Laws. In subdivision c. of the comment under § 166, it states that "If an act which is outside the purposes of incorporation (see § 156) or which is prohibited either

by the state of incorporation or by the state where the act is to be done (see § 165) is directed to be done by the corporation, the effect of the performance of such an act on behalf of the corporation is governed by the law of the state where the act is done."

Even in the federal courts the local law which now determines the effect of an *ultra vires* pledge is the state statute or the state common law, just as before *Erie R. R. Co.* v. *Tompkins* it used to be the state statute or federal common law. "Federal common law" has, since the decision in *Erie R. R. Co.* v. *Tompkins*, no sway over *ultra vires* pledges except those made in the territories or in the District of Columbia or in some state which has no statutes or decisions declaring the law as to the consequences of an *ultra vires* pledge.

We do not understand the Circuit Court of Appeals to quarrel with the proposition that if federal common law were all that was involved, the mere citation of *Erie R. R. Co.* v. *Tompkins*, would brush it aside and bring into play in its stead the New York state law on the consequences of the *ultra vires* pledge. The Circuit Court of Appeals controverts our statement that the National Bank Act is silent as to the effect of the *ultra vires* pledge. It says that Congress has, by implication, declared that the state law shall give no effect to *ultra vires* pledges where national banks are concerned.

The difference between us is, therefore, that the City construes the National Bank Act as being silent on the subject of the effect of the *ultra vires* pledge while the Circuit Court of Appeals construes it as impliedly declaring that such a pledge shall have no effect.

The construction urged by the City is in harmony with the long established policy of Congress toward placing the national banks upon an equal footing with the state banks in the states where they operate. (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564, *supra.*) Every time that the courts adopt a construction of the National Bank

Act which applies state law to the transactions of the bank, it enables the national banks to compete upon an equal footing with the state banks, and every time that, as here, the courts adopt a special rule for national banks, they run the risk of putting the national banks at a disadvantage in their competition with the state banks.

An intention to supersede the state law as to the effect of the transactions of a national bank is not lightly to be imputed to Congress. The national banking power is not an expressly enumerated one and exists only as an incident of sovereignty. (*McCulloch* v. *Maryland*, 4 Wheat. 316 (1819)). This Court, in *National Bank* v. *Commonwealth*, 9 Wall. 353, 362 (*supra*), held that it followed therefore that "It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." It may be that the decisions have grown a little more liberal toward the power of Congress, by the enactment of express legislation, to supplant the operation of state laws upon the transactions of national banks, but it still holds true that "a national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law". (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 566, *supra;* see also *First National Bank* v. *Missouri*, 263 U. S. 640, 656 (1924); *McClellan* v. *Chipman*, 164 U. S. 347, 357 (*supra*).

Thus, in order to reach the result that federal law controlled this question as to the effect of an *ultra vires* pledge by a national bank to secure deposits, it was not enough for the courts below to conclude that, if Congress had prescribed the effect of an *ultra vires* pledge, Congress would have made an *ultra vires* pledge, null and void. The courts had to find not only the general views of Congress on such a question but also that Congress had ousted the state law by enacting those views into statutes and had thus preempted the field as against state law as to the consequences of an *ultra vires* pledge by a national bank to secure deposits.

We submit that nothing in the National Bank Act indicates an intention on the part of Congress to invade the field of the local law in prescribing the effect to be given to an *ultra vires* pledge. We concede that except where the state law is expressly adopted by Congress, the National Bank Act as construed by the federal courts is the only source upon which we can draw in order to determine whether a given act of a national bank is *intra vires* or *ultra vires*, as those terms are ordinarily used, but unless Congress by an unmistakable exercise of its paramount power in the national banking field invades what would otherwise be the domain of the state, the consequences of such an *ultra vires* act are determined by the law of the state where it occurs. (*Security National Bank* v. *St. Croix Power Co.*, 117 Wis. 211, 94 N. W. 74 (1903)).

It is to be noted that the acceptance of the state law as to the effect of the *ultra vires* pledge does not result in a state law lien *arising on insolvency* of the kind properly held invalid as far as national banks are concerned. (*Old Company's Lehigh Iron* v. *Meeker*, 294 U. S. 227 (1935); *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216 (1935). The lien on the security to the extent of the deposits exists from the instant the security is taken. Such a lien, though created by state law, is effective as applied to national banks (*Scott* v. *Armstrong*, 146 U. S. 499, 510 (1892); *Willing* v. *Binenstock*, 302 U. S. 272, 276 (1937); *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 568, *supra*.) The Circuit Court of Appeals distinguished these cases (p. 73) only on the theory that the lien in the case at bar is invalid because it is in "conflict with the policy of the Bank Act". But that is the very question here at issue. We submit that we have shown that the National Bank Act has not invaded the field of state law so as to make any such policy effective.

b. The New York Law as to the Consequences of the Pledge was Incorporated in the National Bank Act by Reference.

The so-called Enabling Amendment of June 25, 1930 (12 U. S. C. §90, *supra*) provides:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

It appears therefrom that the security which a national bank may give to a political subdivision of a state is security "of the same kind as is authorized by the law of the State" in the case of other banking institutions in the State.

If it can be said that the result of the New York decisions is that a New York state bank "is authorized by the law of the State" to give security for deposits, which, although it is recoverable whenever the bank or the Superintendent of Banks elects to pay back the deposits, may nevertheless be held by the depositor until such payment, then that law is picked up by the Enabling Amendment and made part of the National Bank Act and a national bank in New York has the same authority with respect to public deposits.

The problem of course is whether the Enabling Amendment, by the use of the words "authorized" security, included security, the giving of which was said by the state court to be *ultra vires* but, nevertheless, enforcible to a limited extent. The whole difficulty arises from the fact that the Enabling Amendment uses the word "authorized" instead of the word "recognized".

If there is no significance in the use by Congress of the word "authorized" instead of the word "recognized", then

Congress adopted and applied to national banks not only the state law as to what pledges are *intra vires* for state banks but also the state law as to the effect of *ultra vires* pledges by state banks.

No subject is more difficult to discuss than that of *ultra vires*. There seems to be a contradiction in terms in saying that a corporation has *power* to perform an act which is outside of its *powers*. Yet both the federal and state courts have held in effect that national and state banks have such power (*First National Bank of Aiken* v. *Mott Iron Works*, 258 U. S. 240 (1922); *Citizens' Central National Bank* v. *Appleton*, 216 U. S. 196 (1910); *Pullman's Palace-Car Co.* v. *Central Transportation Co.*, 171 U. S. 138 (1898); *Aldrich* v. *Chemical National Bank*, 176 U. S. 618 (1900); *Logan County National Bank* v. *Townsend*, 139 U. S. 67 (1891); *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, *supra*). It was perhaps to avoid that contradiction in terms that the profession preferred to use Latin and say that a corporation had power to perform an "*ultra vires*" act. But however it is to be expressed, there is no doubt that a corporation, as pointed out by the Circuit Court of Appeals (R. 231), has at least two kinds of powers. These powers are, on the one hand, approved powers, and, on the other, powers to accept the liabilities and rights thrust upon the corporation by the local law as consequences of the attempted exercise of disapproved powers. The first class may be referred to as *de jure* powers, and the second as *de facto* powers.

This analysis by the Circuit Court of Appeals in this case reveals that in every case where the law of the incorporating jurisdiction holds a corporation for the consequences of an *ultra vires* act, it does two things: First, it lays down those particular consequences as resulting from the *ultra vires* act, and, second, and necessarily, it holds that the corporation has power to accept those consequences. Accordingly, every time a court of the state of incorporation holds a corporation for the consequences

of an *ultra vires* act, it holds that the corporation is "authorized" to accept them.

If Congress was using the word "authorized" in the Enabling Amendment in that sense, then the Enabling Amendment ordained that national banks should not only have all of the *intra vires* powers of competing state banks but also such powers to accept the consequences of their *ultra vires* acts as were ordained by the judicial decisions of their state of incorporation.

The Circuit Court of Appeals was mistaken in saying (R. 229) that "The parties conceded that the law of New York with respect to an *ultra vires* pledge did not bring the pledges here within the Act of June 25, 1930" (the Enabling Amendment). We did not so concede below nor do we so concede now.

The Circuit Court of Appeals says in its opinion (R. 229) that "A pledge which is *ultra vires* cannot be said to be 'authorized'." This overlooks the point so clearly brought out by the court itself that the capacity to accept the consequences of an *ultra vires* act is itself a power. Were we speaking of rights and liabilities thrust upon a foreign corporation by the courts of the local jurisdiction as a consequence of an *ultra vires* act, it might be inapt to say that the corporation was "authorized" to accept those consequences. When the courts of the state of incorporation, however, as they do here, thrust these rights and liabilities upon a state bank, the law of that state both creates the rights and liabilities and gives the power to accept them. "Giving" a power is but another word for "authorizing" its exercise.

Another reason why the word "authorized" may seem inappropriate as a designation of the *de facto* power to accept the consequences of an *ultra vires* act is that most of us think of "authorized" powers as those which owe their existence or non-existence to the express or implied will of the Legislature, and think of these *de facto* powers as owing nothing to the legislative will for their existence or non-

existence. Congress, however, according to the Circuit Court of Appeals, voluntarily and deliberately decreed in the original part of the National Bank Act the non-existence of a certain *de facto* power—the power to accept the consequences of a disapproved pledge to secure deposits. Thus, Congress, the very body which used this word "authorized" in the Enabling Amendment, thinks of these *de facto* powers as being within the class where existence or non-existence depends on the expressed or implied will of the Legislature. Hence, to Congress, "authorized" powers include those *de facto* powers where there is no expressed or implied legislative decree of non-existence. To the mind of Congress, an implied *de facto* power, implied because not denounced by the Legislature, is as truly "authorized" as an implied *de jure* power is "authorized".

Thus, the expression security "authorized by law", when used by Congress with reference to state banks, was, at worst, equivocal. The expression might have referred only to *intra vires* security or it might have included *ultra vires* security which the local law authorized the state bank to recognize. If, by following the Blackstonian canon of construction, to consider the old law and the mischief, we find that the natural intent of Congress would have been to apply the broader interpretation to the word "authorized", we may conclude that Congress did so.

It is settled that the purpose of the adoption of the Enabling Amendment was to enable national banks to compete with state banks for public deposits. (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564, *supra*). As appeared from the quotation from the opinion in *McNair* v. *Knott*, 302 U. S. 369, at p. 4 of the foregoing petition for *certiorari*, a majority of the states permitted pledges to secure public deposits. Congress wanted to put national banks on a footing of equality with state banks in these states in so far as their powers to give pledges to secure public deposits were concerned.

It is impossible to conceive of any intelligible motive for distinguishing between *de jure* and *de facto* powers. By the Enabling Amendment, Congress, on the *de jure* side, subjected the national banks to the whim of the state legislatures. The greater good involved in equal competition was thought to justify this. There is no reason why the same consideration would not justify Congress, on the *de facto* side, in subjecting national banks to the decisions of the state courts. If there was a Congressional policy against permitting political subdivisions to obtain pledges from national banks which would result in preferences in case of insolvency, that policy was surrendered into the keeping of the several states where the banks operated. There is no indication, unless it be in the letter of the word "authorized", that Congress was willing to bow to the will of the state legislatures but not to the will of the state courts.

Such a literal interpretation of the word "authorized" would not meet the mischief which the Enabling Amendment was designed to meet. The situation resulting in the State of New York from the decision below is a perfect example of the failure.

A decision rendered by the Court of Appeals of the State of New York after the pledges here involved were made, while it held that such a pledge was not approved by the Banking Law and should be rescinded by the Superintendent of Banks, nevertheless held that it might be retained until the deposit was repaid in full. The City of Mount Vernon, Westchester County, which deposited its funds in a state bank and had them secured by such a pledge, was able to recover its deposits in full, under the New York State doctrine, when the bank failed (*City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400 (*supra*)), but the City of Yonkers, Westchester County, which deposited its funds in a national bank secured by the same pledge, has not been allowed its full deposits by the courts below.

We cannot pretend that unless the decision below is reversed there are going to be a great number of newly-arising cases in New York which will exhibit this discrimination between the treatment of municipalities which have secured pledges from national banks, on the one hand, and those which have secured pledges from state banks, on the other. As respects future banking practice, there are not going to be any pledges given by state banks which might give the state banks the advantage in competing with national banks for public deposits. The Superintendent of Banks is required to visit the New York state banks twice a year and is under strict instructions from the New York Court of Appeals to rescind any pledges to secure deposits where not contemplated by statute. (*State Bank of Commerce* v. *Stone*, 261 N. Y. 175, 187, *supra*.) As appears from the petition for *certiorari*, however, other existing controversies depend upon the decision of this one. Still more important is the general effect of the decision below upon the attitude of the fiscal officers of municipalities toward national banks as distinguished from state banks. Before the New York Court of Appeals had announced its rule favoring the municipalities and before the United States Supreme Court announced its rule against the municipalities, the national and state banks in Westchester County were competing for deposits of public moneys. The City of Mount Vernon chose a state bank and took security while the City of Yonkers chose a national bank and took security. The fiscal officials of the cities of the State of New York know that the city that used the state bank was held to be preferred when the bank failed and the city which used the national bank was held to be a mere general creditor. The resultant disadvantage of the national banks was precisely what Congress was attempting to obviate by the adoption of the Enabling Amendment. The purpose of Congress can be attained by giving to the word "authorized" its broad but perfectly legitimate sense of "recognized" and applying it to the *de facto* security resulting from a disapproved pledge under the New York law.

POINT II.

The deposits paid out upon payroll checks of the City prior to the date that the Comptroller took over the Bank cannot be recovered by the receiver even if the federal decisions apply.

a. The determination of the Circuit Court of Appeals in affirming so much of the judgment of the District Court as allowed the Receiver to recover 50% of the deposits paid prior to the time the Comptroller took over the Bank is squarely opposed to and in conflict with the determinations of this Court and of several Circuit Courts of Appeal.

(1) It is opposed to the determination of this Court that to recover payments as preferential under §91 (12 U. S. C.) a mere finding of insolvency is insufficient in the absence of proof that the payments were made after an act of insolvency or in contemplation thereof with a view to prefer one creditor to another.

On Saturday, March 4, 1933, the City had on deposit with the Bank $277,230.25 in three accounts (R. 165). On the next business day, March 6, 1933, the President proclaimed a banking holiday to and including March 9, 1933, during which "all banking transactions shall be suspended" (Proc. #2039; appendix, p. 33) which was continued indefinitely on March 9 (Proc. #2040; appendix, p. 35). Under the authority of the first proclamation the Secretary of the Treasury issued Regulation #10 permitting national banks to carry on their functions for, among other things, "the payment of usual salaries and wages" (appendix, p. 41). Thereafter the Bank honored payroll checks drawn by the City against its deposits and paid out thereon $89,226.06 prior to March 20, 1933 (R. 167) when the Comptroller appointed a conservator. The receiver brought this action to recover, among other things, 50% of the money so paid out between March 6 and 20, 1933, under §91 (12

U. S. C.) as preferential payments. The District Court permitted such recovery and the Circuit Court affirmed.

The only authority for the recovery of payments as preferential is §91 of Title 12 U. S. C. A. (R. S. §5242, printed in full in the Appendix, p. 39), which provides so far as material here that "* * * all payments of money * * *, made after the commission of an act of insolvency, or in contemplation thereof, made * * * with a view to the preference of one creditor to another, * * * shall be utterly null and void, * * *".

The foregoing statute has often been construed by this and other courts to require proof of payment "after the commission of an act of insolvency, or in contemplation thereof" or "with a view to the preference of one creditor to another." (*McDonald* v. *Chemical National Bank*, 174 U. S. 610; *Earle* v. *Carson*, 188 U. S. 42, 1903; *Pearson* v. *Durell*, 77 F. 2d, 465, C. C. A.—10th Cir. 1935; *Rucher* v. *Kokrda*, 68 F. 2d 73, C. C. A.—10th Cir., 1933).

In the case at bar the Circuit Court affirmed the judgment of the District Court permitting recovery of the payments prior to March 20, 1933. The District Court stated in its opinion "there is no direct proof of the insolvency of the bank prior to January 23, 1934, when the Receiver was appointed" (R. 193), but, nevertheless, it found that the Bank was insolvent "as of the 6th day of March, 1933" (R. 159).

We challenge our adversaries to point to any finding by the District Court that the payments were made "after the commission of an act of insolvency" or a finding that the payments were made "in contemplation thereof". In the absence of such a finding this Court has pointed out that "the mere fact that at the time of the transfer the bank * * * was insolvent * * *" unless the fact of insolvency is shown to have been known, is not enough (*Earle* v. *Carson*, 188 U. S. 42, 48, *supra*).

The Circuit Court found that "the facts" were sufficient for the Trial Court to "draw the inference that the

payments were in violation of 12 U. S. C. A., §91" (R. 233, 234). We submit that there just are no such "facts" in the case. The only evidence is that of the banking holiday proclamations and that the Bank closed pursuant to them. Even the trial court was not sure such facts were sufficient for it concluded that "a presumption of insolvency as of March 6, 1933, arises and continues to the time of the appointment of a Receiver, since the bank never opened its doors for the transaction of regular business after March 6, 1933" (R. 193) and "Presumptively the bank was insolvent when all the deposits in question were paid out" (R. 194). It is obvious, therefore, that the recovery allowed the Receiver herein was predicated by the courts below solely upon the fact that the Bank closed pursuant to the direction of the banking holiday proclamations. We submit that such evidence falls far short of constituting proof that the Bank "had failed to pay any depositor on demand, or had not met at maturity all its obligations" which this Court indicates is required in *McDonald* v. *Chemical National Bank*, *supra*, p. 618.

Of course, the District Court did make a finding that the payments were made with the view to the preference of the City over other creditors (R. 162). However, there is no evidence to support this finding. At best it can be supported only by proof that the payments were made after an act of insolvency or in contemplation thereof. There is no finding or proof of such an act,—merely the finding that the Bank was insolvent. That such cannot support a finding of an intent to prefer was pointed out by this Court in the *McDonald* case, *supra*, at page 618:

> "Nor can a finding that the payments and remittances made to the Chemical National Bank, on the dates above mentioned were made in contemplation of insolvency and with an intent to prefer that bank, be based on the mere allegation that the Capital National Bank was actually insolvent, and that its insolvency must have been known to its officers."

The determination of the Circuit Court in affirming the judgment below is squarely opposed to the decision of this Court in the *McDonald* case and should be reversed to the extent that the judgment includes the payments made prior to the date on which the Conservator was appointed.

(2) The decision below is in conflict with the determination of the Circuit Courts of Appeal for the Fifth and Third Circuits holding that the closing of the Bank pursuant to the Presidential Proclamation declaring a banking holiday is not an act of insolvency under which payments made thereafter are preferential.

We have seen under (1), *supra*, that a recovery by a receiver under §91 must be based upon proof that the bank made payments "after the commission of an act of insolvency, or in contemplation thereof" and with "a view to the preference of one creditor to another". It has likewise been pointed out that the Circuit Court held that there are sufficient "facts" from which "the trial court could properly draw the inference that the payments were in violation of 12 U. S. C. A. §91" (R. 233, 234). The statement in the opinion of the trial court that "a presumption of insolvency as of March 6, 1933, arises and continues to the time of the appointment of a Receiver, since the bank never opened its doors for the transaction of regular business after March 6, 1933" demonstrates that the only evidence forming a basis for its conclusion is that the bank closed pursuant to the direction of the Presidential Proclamation. Furthermore, there is not one iota of additional evidence of any act of insolvency, the District Court having itself pointed out that only "Presumptively the bank was insolvent" (R. 194). In affirming the judgment below the Circuit Court has held that the closing of the bank pursuant to the Presidential Proclamation is an act of insolvency or in contemplation of insolvency and that payments made thereafter, even though on payroll checks as authorized by Regulation #10 of the Secretary of the Treasury, were preferential in violation of §91.

This determination is squarely in conflict with that of the Circuit Court of Appeals for the Fifth Circuit in *Kullman Co.* v. *Woolley*, 83 F. 2d 129 (*supra*), wherein it was held (p. 131):

> "Refusals to pay checks solely because of them (Presidential Proclamation and regulations thereunder) would not be acts of insolvency, but only the observance of a new law of banking. Therefore payments of checks which were thereby permitted would not in themselves be preferences."

It has long been settled by the decisions of this Court that the rights of creditors in the assets of an insolvent national bank are based upon "the amount of their claims at the time of the declaration of insolvency". *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131, at p. 146 (1899).

In the case at bar the trial court found that the rights of general creditors became fixed upon March 6, 1933 (No. 2, R. 159). The only support for the selection of March 6, 1933, as the "time of the declaration of insolvency" is that the bank closed under the direction of the Presidential Proclamation, so that the trial court, in fixing March 6, 1933, for the determination of the rights of creditors has necessarily given effect to the banking holiday proclamation as a declaration of insolvency.

The determination in the case at bar is also in conflict with determination of the Circuit Court of Appeals for the Third Circuit in *Richman* v. *First Methodist Episcopal Church*, 76 F. 2d 344 (*supra*), wherein it held that the date to which interest should be allowed on a claim against a closed national bank is the date the conservator was appointed, March 24, 1933. Since interest is allowable to the "date of the insolvency" (*White* v. *Knox*, 111 U. S. 784, 788, 1884), as the Third Circuit points out, its determination that interest be allowed to March 24, 1933, is a determination that the "date of the insolvency" of banks closed

under the 1933 bank holiday proclamation and legislation, is the date the conservator was appointed.

Not only is the determination of the Circuit Court in this case that the date of insolvency for fixing of creditors' claims is March 6, 1933, in conflict with the Third Circuit's decision in the *Richman* case, *supra,* but is also squarely opposed to its own decision in *Bryce* v. *National City Bank of New Rochelle,* 93 F. 2d 300 (*supra*), wherein it stated, after referring to the appointment of the conservator for the bank therein, at page 302:

> "That was the time as of which claims against the bank must be resolved."

We submit that this conflict in decisions should be settled by the determination of this Court.

(3) The determination of the Circuit Court in this case is squarely in conflict with that of the Third Circuit holding that the burden of proving that a transaction is in violation of §91, is upon the receiver.

The Circuit Court in the case at bar, after stating that the bank closed March 4, 1933 (which it was compelled to do by the Presidential Proclamation), adds "no attempt was made by the appellants (the defendants) to show any change in the Bank's condition after March 4, 1933" (R. 233) or, in other words, it held that the defendant City had the burden of proving that the bank did not commit an act of insolvency. In so holding the Circuit Court's determination is in conflict with the determination of the Third Circuit in *Collins* v. *School District of Borough of Trafford,* 72 F. 2d 339 (*supra*), wherein it is stated at page 340:

> "The burden is upon the receiver to prove that the assignment was made in contemplation of insolvency."

b. The District Courts and Circuit Courts throughout the country are not in accord as to whether claims of cred-

itors should be resolved as of the date of the Presidential Proclamation or as of the date the Comptroller took over the bank.

The following cases have held that claims of creditors should be resolved as of the date of the appointment of the conservator.

Bryce v. *National City Bank of New Rochelle*, 93 F. 2d 300 (C. C. A. 2nd, *supra*);
Richman v. *First Methodist Episcopal Church*, 76 F. 2d 344 (C. C. A. 3rd, *supra*), cert. den. 296 U. S. 593;
Schram v. *Clair*, 28 F. Supp. 422 (E. D. N. Y., *supra*);
Ward v. *Simon*, 23 F. Supp. 117 (E. D. Pa., *supra*);
Pyne v. *Jackman*, 12 F. Supp. 653 (S. D. N. Y., *supra*);
Aufderheide v. *Mine Safety Appliance Co.*, 9 F. Supp. 918 (W. D. Pa., *supra*);
Sadlier v. *Lay*, 222 Wis. 641, 269 N. W. 555 (Supreme Ct., *supra*);
Goess v. *Myers*, 134 Pa. Super. 272, 4 A. 2d 184 (Sup. Ct., Pa., *supra*).

In one reported case the court was uncertain as to which date controlled, but was not forced to decide because the transaction occurred after both dates.

Willing v. *Argosy Building & Loan Assn.*, 19 F. Supp. 353, at page 354 (E. D. Pa., *supra*).

In his brief to the Circuit Court the Receiver contended that several cases held that the rights of creditors are fixed as of the date of the President's proclamation. The cases he referred to are:

Hardee v. *Washington Loan & Trust Co.*, 91 F. 2d 314 (*supra*);

Dehne v. *Mine Safety Appliance Company*, 94 F. 2d 956 (*supra*);
Willing v. *Eveloff*, 94 F. 2d 344 (*supra*); cert. denied 305 U. S. 611.

We pointed out in our brief to the court below that the record on appeal in each of those cases indicated that there was abundant evidence of insolvency produced at the trial in the case of the first two, and that in the *Willing* case the Bank had committed an act of insolvency by closing prior to March 4, 1933.

We submit, however, that the decision of the Circuit Court of Appeals in the case at bar which is now printed in the reports and stands as a precedent, together with the decisions referred to above, creates sufficient doubt and lack of uniformity as to the date on which must be fixed the rights of creditors of national banks closed during the 1933 banking holiday, for this Court to determine the question finally.

POINT III.

The writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

E. J. Dimock,
Counsel for Petitioner.

Leonard G. McAneny,
J. Donald Rawlings,
Of Counsel.

Appendix.

Proclamation of President of March 6, 1933, declaring a bank holiday.

PROCLAMATION No. 2039.

"WHEREAS there have been heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding; and

"WHEREAS continuous and increasingly extensive speculative activity abroad in foreign exchange has resulted in severe drains on the Nation's stocks of gold; and

"WHEREAS these conditions have created a national emergency; and

"WHEREAS it is in the best interests of all bank depositors that a period of respite be provided with a view to preventing further hoarding of coin, bullion or currency or speculation in foreign exchange and permitting the application of appropriate measures to protect the interests of our people; and

"WHEREAS it is provided in Section 5 (b) of the Act of October 6, 1917, (40 Stat. L. 411) as amended, 'That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency * * *' and

"WHEREAS it is provided in Section 16 of the said Act 'that whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act, shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; * * *';

"NOW, THEREFORE, I, Franklin D. Roosevelt, President of the United States of America, in view of such national emergency and by virtue of the authority vested in me by said Act and in order to prevent the export, hoarding, or earmarking of gold or silver coin or bullion or currency, do hereby proclaim, order, direct and declare that from Monday, the sixth day of March, to Thursday, the ninth day of March, Nineteen Hundred and Thirty Three, both dates inclusive, there shall be maintained and observed by all banking institutions and all branches thereof located in the United States of America, including the territories and insular possessions, a bank holiday, and that during said period all banking transactions shall be suspended. During such holiday, excepting as hereinafter provided, no such banking institution or branch shall pay out, export, earmark, or permit the withdrawal or transfer in any manner or by any device whatsoever, of any gold or silver coin or bullion or currency or take any other action which might facilitate the hoarding thereof; nor shall any such banking institution or branch pay out deposits, make loans or discounts, deal in foreign exchange, transfer credits from the United States to any place abroad, or transact any other banking business whatsoever.

"During such holiday, the Secretary of the Treasury, with the approval of the President and under such regulations as he may prescribe, is authorized and empowered (a) to permit any or all of such banking institutions to perform any or all of the usual banking functions, (b) to direct, require or permit the issuance of clearing house certificates or other evidences of claims against assets of banking institutions, and (c) to authorize and direct the creation in such banking institutions of special trust accounts for the receipt of new deposits which shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separately in cash or on deposit in Federal Reserve Banks or invested in obligations of the United States.

"As used in this order the term 'banking institutions' shall include all Federal Reserve banks, national banking

associations, banks, trust companies, savings banks, building and loan associations, credit unions, or other corporations, partnerships, associations or persons engaged in the business of receiving deposits, making loans, discounting business paper, or transacting any other form of banking business."

Proclamation of President of March 9, 1933, continuing Bank Holiday.

PROCLAMATION No. 2040.

"WHEREAS, on March 6, 1933, I, FRANKLIN D. ROOSEVELT, President of the United States of America, by Proclamation declared the existence of a national emergency and proclaimed a bank holiday extending from Monday the 6th day of March to Thursday the 9th day of March, 1933, both dates inclusive, in order to prevent the export, hoarding or earmarking of gold or silver coin, bullion or currency, or speculation in foreign exchange; and

"WHEREAS, under the Act of March 9, 1933, all Proclamations heretofore or hereafter issued by the President pursuant to the authority conferred by section 5 (b) of the Act of October 6, 1917, as amended, are approved and confirmed; and

"WHEREAS, said national emergency still continues, and it is necessary to take further measures extending beyond March 9, 1933, in order to accomplish such purposes:

"NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, in view of such continuing national emergency and by virtue of the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. L., 411) as amended by the Act of March 9, 1933, do hereby proclaim, order, direct and declare that all the terms and provisions of said Proclamation of March 6, 1933, and the regulations and orders issued thereunder are hereby continued in full force and effect until further proclamation by the President."

TITLE 12 U. S. C. A. §90.

§90. Depositaries of Public Moneys and Financial Agents of Government.

"All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." (R. S. 5153).

TITLE 12 U. S. C. A., §91.

"§91. TRANSFERS BY BANK AND OTHER ACTS IN CONTEMPLATION OF INSOLVENCY.

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. (R. S., §5242.)"

REGULATION NO. 10 OF SECRETARY OF TREASURY.

"Regulation No. 10 (March 7, 1933, as amended on March 10 by addition of matter in italics). 'Any national or State banking institution may exercise its usual banking functions to such extent as its situation shall permit and as shall be absolutely necessary to meet the needs of its community for food, medicine, other necessities of life, for the relief of distress, *for the payment of usual salaries and wages*, for necessary current expenses and for the purpose of maintaining employment, and for other similar essential purposes. Banking institutions may carry out such transactions as may be necessary to aid banking institutions in other communities *to meet the necessities set forth above*. Provided, however, that (1) every precaution shall be taken to prevent hoarding or the unnecessary withdrawal of currency; (2) no State banking institution shall engage in any transaction under this regulation which is in violation of State or Federal law or of any regulation issued thereunder; (3) no national banking association shall engage in any transaction under this Section which is in violation of any Federal law or of any order or regulation issued by the Comptroller of the Currency; and (4) no gold or gold certificates shall be paid out. Each banking institution and its directors and officers will be held strictly accountable, for the faithful performance, with the spirit and purpose, as well as the letter of this regulation. *Federal reserve banks* may carry on such functions as may be necessary to facilitate transactions authorized by this regulation.'"

FILE COPY

No. 543

NOV 20 1939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

E. J. DIMOCK,
Counsel for Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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We respectfully refer the Court to the brief attached to the petition in *The City of Yonkers* against *Walter F. Downey* (filed contemporaneously herewith).

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JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Joseph F. Loehr, *et al*, petitioners above named, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on August 22, 1939.

Opinion Below.

The opinion of the United States District Court for the Southern District of New York is not reported (R. 140-141). The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 106 F. 2d 69 (R. 171-181).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 22, 1939 (R. 182). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Presented.

The questions presented by this petition are two:

1. Whether the effect of an *ultra vires* pledge made by a national bank in New York to secure a deposit is determined (a) by the rule in the federal courts that the bank need not repay the deposit in order to obtain the return of the pledged securities or (b) by the rule in the New York courts that the bank must repay the deposit in order to obtain this return.

2. Whether payments made by a bank to a depositor in accordance with the Presidential Proclamation after the banking holiday of March 6, 1933, but before the bank was taken over by the Comptroller of the Currency, can be recovered as preferential without any proof that the payments were made after the commission of an act of insolvency or in contemplation of insolvency, or proof that the payments were made with the intent of creating a preference.

Statutes and Proclamations Involved.

The statutes and proclamations involved are set out in the Appendix to the petition and brief submitted contemporaneously herewith in the companion action of *The City of Yonkers, against Walter F. Downey, Receiver.*

Companion Actions.

At about the time this action was instituted in the District Court, the Receiver instituted similar actions against The City of Yonkers, the Trustees of the Firemen's Pension Fund of the City of Yonkers, and The City of Yonkers, as Trustee of the "Saunders Trade School Fund". All four of the actions were tried separately, but in immediate succession. Appeals to the United States Circuit Court of Appeals for the Second Circuit were taken in all four actions simultaneously, and the appeals argued at the same time, the Court handing down one opinion bearing the caption of all four actions (R. 171). Petitions to this Court for a writ of certiorari are being made simultaneously in each of the four actions, the other three petitions being entitled:

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School Fund', Petitioner, against *Walter F. Downey, as Receiver of The First National Bank and Trust Company of Yonkers, New York",* October Term, 1939, No. 545 .

Statement.

On July 10, 1929, the Board of Estimate and Apportionment of The City of Yonkers adopted a resolution designating certain banks as depositaries for all moneys of the City, and directing the City Treasurer to procure adequate security for all moneys deposited by him in such banks, securing the City of Yonkers against any loss of the moneys deposited and prescribing rates of interest on the general accounts which must be received (R. 96). On September 30, 1929, The First National Bank and Trust Company of Yonkers was formed by merger of three of the depositaries named in the Resolution (R. 67, 104, 105).

On June 25, 1930, the so-called National Bank Enabling Amendment (12 U. S. C. 90, 46 Stat. 809) took effect. It provided:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State, in which such association is located in the case of other banking institutions in the State."

The banking practice and the accepted view of the law as to such pledges at the time of the passage of the Enabling Amendment and thereafter appear in the following quotation from the opinion of this Court written by Mr. Justice Black in *McNair* v. *Knott*, 302 U. S. 369, 371 (1937):

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tice of the banks in pledging such security. It has been, and is now, the policy of most states to require security for public funds whether deposited in State or National banks. The weight of judicial authority in the state courts has supported the doctrine that banks could pledge security for public deposits, but not for private deposits."

On February 28, 1933, the Court of Appeals of the State of New York handed down an opinion in *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, which held that a pledge by a state bank to secure a deposit was *ultra vires* but that the assets pledged could not be recovered without repaying the deposit.

On March 4, 1933, petitioners had on deposit in the Bank funds in the sum of $29,233.67, in an account entitled "Police Pension Fund, City of Yonkers", (R. 119), and in the sum of $50, in an account entitled "City of Yonkers, Police Pension Fund" (R. 119). On that day, The City of Yonkers held bonds having a par value of $535,000 which had been pledged with it in accordance with the Resolution, as security for the deposits in the above accounts, as well as for the deposits in the accounts involved in the three companion actions (R. 118).

The Governor of the State of New York proclaimed Saturday, March 4th, and Monday, March 6th, banking holidays (R. 88), and on March 6th, the President and the Governor declared a banking holiday to and including Thursday, March 9th (R. 90). During this period and up to March 20, 1933, The First National Bank and Trust Company was under the management and control of its own officers, but under restrictions imposed upon it and all other banks (R. 35). While the Bank was under the control of its officers and before the appointment of a Conservator, pension checks issued by petitioners, aggregating $566.67, were honored and paid out of the larger account by the Bank (R. 166).

On March 20, 1933, the Comptroller of the Currency appointed a Conservator of the Bank. Between March 20, 1933, and March 28, 1933, payroll checks issued by the petitioners aggregating $520.83 were honored and paid out of the larger account (R. 121).

On March 28, 1933, the Conservator and petitioners agreed that the bank would repay the deposits to petitioners if they would surrender the pledged assets. By various withdrawals of deposits from the accounts aggregating $28,196.17, and surrenders of securities of a par value of $534,000, this agreement was carried out, making a total of $29,283.67 of deposits withdrawn from the accounts (R. 121-124, inc.).

On February 5, 1934, after all of these withdrawals and surrenders, the United States Supreme Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, held that a pledge by a national bank to secure a deposit was *ultra vires* and that the receiver of the bank could recover the pledged assets without paying back the deposits.

Thereafter this action and the three companion actions were brought by a Receiver who had succeeded the Conservator of the First National Bank and Trust Company of Yonkers (R. 87) to recover the deposits which the Bank had paid out on pension checks and the deposits which the Conservator had paid out in exchange for the pledged assets in so far as such deposits exceeded the 50% dividend to which petitioners would have been entitled as unsecured depositors.

The cases were tried before a Judge in the United States District Court for the Southern District of New York, a jury having been waived by stipulation on the record (R. 29).

If the law as laid down by the New York State courts governed the consequences of the pledge either by its own force or by adoption by the federal statute, the repayment of the deposits and the return of the pledged securities was

in strict accordance with the rights of the parties so that the plaintiff could not succeed.

If, however, the law as stated in the federal courts were applicable to the consequences of the pledge, the Conservator had overpaid petitioners when he paid out the deposits in full and recovered the pledged securities.

Even if the repayment of the deposits had not been justified by the existence of the pledge, the Receiver could not recover without proof that the payments by the Bank were made after the commission of an act of insolvency, or in contemplation of insolvency, or proof that the payments were made with the intent to prefer petitioners over other creditors.

The District Court (R. 137) refused to find as Conclusions of Law that if the pledge was *ultra vires* the rights and obligations of the parties were determined by the laws of the State of New York (No. 33, R. 131) and that in order to recover the pledged assets it was necessary to repay the deposits in full (No. 34, R. 131), and that under the law of the State of New York state banks were "authorized" to give security in the case of public deposits (No. 28, R. 130).

The District Court found as a Conclusion of Law (No. 4, R. 127) that the Proclamation of March 6, 1933, did not create a presumption that the Bank was insolvent, but the court nevertheless found as a fact (No. 20, R. 107) that it was insolvent on that day.

Judgment was entered for $14,641.84, representing fifty per cent. of the moneys withdrawn after March 4, 1933, plus interest thereon from May, 1936, in the sum of $2,255.73, or a total of $16,970.42, including costs (R. 143).

Petitioners excepted (R. 138) and assigned error on appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 158, 159, 150). The latter affirmed the judgment of the District Court (R. 182).

Petitioners argued in the Circuit Court of Appeals that the New York State common law controlled the consequences of the pledge under *Erie R. R. Co.* v. *Tompkins*,

304 U. S. 64 (1938), because the National Bank Act (unless it incorporated the state law by reference) made no provision as to the effect of an *ultra vires* pledge of assets to secure a deposit, and, as held in *National Bank* v. *Commonwealth*, 9 Wall. 353 (1869), there was no federal common law of national banking.

The Circuit Court of Appeals denied the validity of one of the necessary steps in that argument by holding that the National Bank Act did in effect make provision as to the consequences of an *ultra vires* pledge of assets to secure a deposit. It held (R. 178) that the matter was one of national concern and that the New York rule was directly in the face of the National Bank Act. It also held that the Enabling Amendment of the National Bank Act did not incorporate the New York state law by reference because a pledge, which only existed because of the power of a New York state bank to accept the liabilities and rights thrust upon it as a consequence of the attempted exercise of a disapproved power, could not be said to be "authorized" (R. 176).

On the second point in the case, petitioners' claim that, because of the absence of proof of the commission of any act of insolvency or contemplation of insolvency or intent to prefer them over other creditors, the receiver could in no event recover the payments made before the Comptroller of the Currency took over the bank, the Circuit Court of Appeals held that the fact that the bank never opened for business between the day of the Presidential Proclamation and its final receivership and that no attempt was made by petitioners to show any change in its condition after that date were sufficient to indicate insolvency at the time of the Proclamation (R. 180).

Specification of Errors to Be Urged.

The court below erred in holding:

1. That the question of the consequences of the *ultra vires* pledge was governed by the decisions of the federal courts rather than the New York courts.

2. That the consequences of the *ultra vires* pledge were fixed by the policy of the National Bank Act.

3. That the so-called Enabling Amendment of the National Bank Act did not adopt the decisions of the New York courts as fixing the consequences of the *ultra vires* pledge.

4. That the mere closing of the bank in the universal banking holiday under the Presidential proclamations, coupled with the taking over of the bank by the Comptroller prior to the close of the banking holiday, is evidence that the bank committed an act of insolvency, or contemplated insolvency or intended to prefer petitioners over other creditors, prior to the date that the Comptroller took over the bank, within the meaning of §91 (12 U. S. C.).

A word should be said with respect to the holding by the Circuit Court of Appeals (R. 181) that the payments made by the Conservator (as distinguished from those made by the Bank) could be recovered because made by a public official under a mistake of law. This ground for recovery does not exist unless there is a mistake of law, and if, as petitioners contended, the New York law applied, the payments instead of being made under a mistake of law were made in strict accordance with law.

Reasons for Granting the Writ.

The writ of *certiorari* should be allowed because:

I. (a) The judgment of the Circuit Court of Appeals in holding that the policy of the National Bank Act fixed the

consequences of an *ultra vires* pledge, decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States, and decided it in a way which is probably in conflict with the decisions of this Court that state laws operate "upon the dealings and contracts of national banks" except where "they expressly conflict with the laws of the United States of frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States" (*McClellan* v. *Chipman*, 164 U. S. 347, 357 (1896); see also *National Bank* v. *Commonwealth*, 9 Wall. 353, 362, *supra*; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275 (1896));

(b) Even if the Circuit Court of Appeals were right in holding that the power to accept the consequences of an *ultra vires* act was a matter of the statutory authority of national banks under the National Bank Act, the judgment of that court in holding that no *ultra vires* power, even though effective under state law, could be said to be "authorized" within the meaning of that term as used by the Enabling Amendment to the National Bank Act, decided an important question of federal law which has not been, but should be, settled by this Court;

(c) The failure of the Circuit Court of Appeals to decide one of these two questions in favor of the application of the state law has resulted in a situation where the City of Mount Vernon has obtained security for its deposits from a state bank and been permitted by the New York Court of Appeals to recover its deposits in full upon insolvency (*City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400 (1936)); while the neighboring City of Yonkers in a precisely similar relationship to a national bank, has been held in this case to be a general creditor only, all in conflict with the traditional desire of Congress to enable the national banks to compete upon a footing of equality with the state banks (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S.

559, 564 (1934). We know of two other municipalities in the State of New York which obtained pledges from national banks to secure their deposits, and their cases and probably those of many others depend upon the decision in the case at bar.

II. a. The determination of the Circuit Court of Appeals in affirming so much of the judgment of the District Court as allowed the receiver to recover 50% of deposits paid prior to the time the Comptroller took over the Bank is opposed to and in conflict with

(1) The determination of this Court that to recover payments as preferential under § 91 (12 U. S. C.), a finding of insolvency is insufficient in the absence of proof that the payments were made after an act of insolvency or in contemplation thereof with a view to prefer one creditor to another. *McDonald* v. *Chemical National Bank*, 174 U. S. 610 (1899); *Earle* v. *Carson*, 188 U. S. 42 (1903);

(2) The determination of the Circuit Courts of Appeals for the Fifth and Third Circuits that the closing of the bank pursuant to the Presidential Proclamation declaring a banking holiday is not an act of insolvency under which payments made thereafter are preferential. *Kullman & Co.* v. *Woolley*, 83 F. 2d 129 (5th, 1936); *Richman* v. *First Methodist Episcopal Church*, 76 F. 2d 344 (3rd, 1935);

(3) The determination of the Circuit Court of Appeals for the Third Circuit that the burden of proving that a transaction is in violation of § 91 is upon the receiver. *Collins* v. *School District of Borough of Trafford*, 72 F. 2d, 339, (1934);

b. The District Courts and Circuit Courts throughout the country are not in accord as to whether claims against a national bank in liquidation after the banking holiday of 1933 should be resolved as of the date of the Presidential Proclamation or as of the date on which the Comptroller

of the Currency took over the Bank through a Conservator. A final determination as to which of these dates controls should be made by this Court to establish uniformity in the decisions in the courts throughout the country.

Bryce v. *National City Bank of New Rochelle*, 93 F. 2d 300 (C. C. A. 2nd, 1937);
Richman v. *First Methodist Episcopal Church*, 76 F. 2d 344 (C. C. A. 3rd, *supra*); cert. den. 296 U. S. 593;
Schram v. *Clair*, 28 F. Supp. 422 (E. D. N. Y., 1939);
Ward v. *Simon*, 23 F. Supp. 117 (E. D. Pa. 1938);
Pyne v. *Jackman*, 12 F. Supp. 653 (S. D. N. Y., 1934);
Aufderheide v. *Mine Safety Appliance Co.*, (W. D. Pa., 1934);
Sadlier v. *Lay*, 222 Wisc. 64; 269 N. W. 555 (Sup. Ct. 1936);
Goess v. *Myers*, 134 Pa. Super. 272; 4 A. 2d 184 (Sup. Ct. Pa., 1939);
Willing v. *Argosy Building & Loan Assn.*; 19 F. Supp. 353, (E. D. Pa., 1937);
Hardee v. *Washington Loan & Trust Co.*, 91 F. 2d 314 (C. A. D. C., 1937);
Dehne v. *Mine Safety Appliance Company*, 94 F. 2d 956 (C. C. A. 3rd, 1938);
Willing v. *Eveloff*, 94 F. 2d 344 (C. C. A. 3rd, 1938); cert. denied 305 U. S. 611.

SUPPORTING BRIEF.

A petition for certiorari in the companion case of *The City of Yonkers* v. *Walter F. Downey*, No. 542, is being submitted to this Court contemporaneously with this petition. There is attached to the petition in the companion case a brief containing the argument of the petitioner therein in

support of its reasons for granting the writ. Since the reasons and the argument in support thereof in this case are identical to those in the companion case, and since the facts in the two cases are the same except that the amounts of the deposits and withdrawals are smaller, we respectfully refer the Court to the brief attached to the petition in *The City of Yonkers* v. *Walter F. Downey,* for the argument in support of the reasons for granting this petition.

Conclusion.

The petition for review on Writ of Certiorari should be granted.

Respectfully submitted,

E. J. Dimock,
Counsel for Petitioners.

November 18, 1939.

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No. 544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Petitioners,

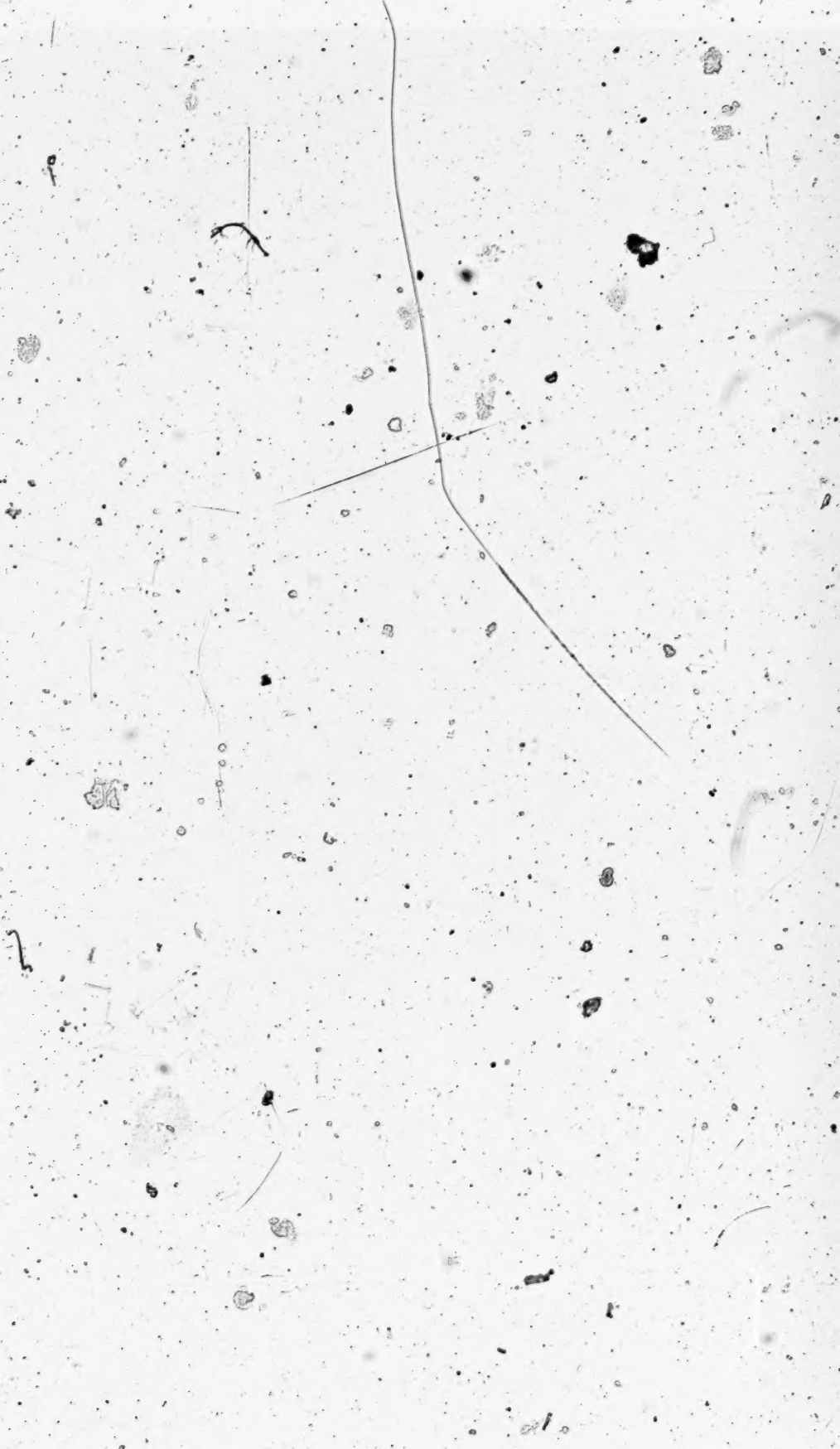
against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

E. J. DIMOCK,
Counsel for Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.



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IN THE

Supreme Court of the United States

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No.

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The questions presented by this petition are two:

1. Whether the effect of an *ultra vires* pledge made by a national bank in New York to secure a deposit is determined (a) by the rule in the federal courts that the bank need not repay the deposit in order to obtain the return of the pledged securities or (b) by the rule in the New York courts that the bank must repay the deposit in order to obtain this return.

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On June 25, 1930, the so-called National Bank Enabling Amendment (12 U. S. C. 90, 46 Stat. 809) took effect. It provided:

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On March 28, 1933, the Conservator and petitioners agreed that the bank would repay the deposits to petitioners

if they would surrender the pledged assets. By various withdrawals of deposits from the account aggregating $16,440.75, and surrenders of securities of a par value of $534,000, this agreement was carried out, making a total of $16,590.75 of deposits withdrawn from the account (R. 118, 119, 120).

On February 5, 1934, after all of these withdrawals and surrenders, the United States Supreme Court in *Texas & Pacific Ry. Co. v. Pottorff*, 291 U. S. 245, held that a pledge by a national bank to secure a deposit was *ultra vires* and that the receiver of the bank could recover the pledged assets without paying back the deposits.

Thereafter this action and the three companion actions were brought by a Receiver who had succeeded the Conservator of the First National Bank and Trust Company of Yonkers (R. 87) to recover the deposits which the Bank had paid out on pension checks and the deposits which the Conservator had paid out in exchange for the pledged assets in so far as such deposits exceeded the 50% dividend to which petitioners would have been entitled as unsecured depositors.

The cases were tried before a Judge in the United States District Court for the Southern District of New York, a jury having been waived by stipulation on the record (R. 23).

If the law as laid down by the New York State courts governed the consequences of the pledge either by its own force or by adoption by the federal statute, the repayment of the deposits and the return of the pledged securities was in strict accordance with the rights of the parties so that the plaintiff could not succeed.

If, however, the law as stated in the federal courts were applicable to the consequences of the pledge, the Conservator had overpaid petitioners when he paid out the deposits in full and recovered the pledged securities.

Even if the repayment of the deposits had not been justified by the existence of the pledge, the Receiver could

not recover without proof that the payments by the Bank were made after the commission of an act of insolvency, or in contemplation of insolvency, or proof that the payments were made with the intent to prefer petitioners over other creditors.

The District Court (R. 133) refused to find as Conclusions of Law that if the pledge was *ultra vires* the rights and obligations of the parties were determined by the laws of the State of New York (No. 33, R. 127) and that in order to recover the pledged assets it was necessary to repay the deposits in full (No. 34, R. 127), and that under the law of the State of New York state banks were "authorized" to give security in the case of public deposits (No. 28, R. 126).

The District Court found as a Conclusion of Law (No. 4, R. 123) that the Proclamation of March 6, 1933, did not create a presumption that the Bank was insolvent, but the court nevertheless found as a fact (No. 20, R. 106) that it was insolvent on that day.

Judgment was entered for $8,295.38, representing fifty per cent. of the moneys withdrawn after March 4, 1933, plus interest thereon from May, 1936, in the sum of $1,277.98, or a total of $9,651.21 including costs (R. 139).

Petitioners excepted (R. 134) and assigned error on appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 154, 153, 146). The latter affirmed the judgment of the District Court (R. 177).

Petitioners argued in the Circuit Court of Appeals that the New York State common law controlled the consequences of the pledge under *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), because the National Bank Act (unless it incorporated the state law by reference) made no provision as to the effect of an *ultra vires* pledge of assets to secure a deposit, and, as held in *National Bank* v. *Commonwealth*, 9 Wall. 353 (1869), there was no federal common law of national banking.

The Circuit Court of Appeals denied the validity of one of the necessary steps in that argument by holding that the National Bank Act did in effect make provision as to the consequences of an *ultra vires* pledge of assets to secure a deposit. It held (R. 173) that the matter was one of national concern and that the New York rule was directly in the face of the National Bank Act. It also held that the Enabling Amendment of the National Bank Act did not incorporate the New York state law by reference because a pledge, which only existed because of the power of a New York state bank to accept the liabilities and rights thrust upon it as a consequence of the attempted exercise of a disapproved power, could not be said to be "authorized" (R. 171).

On the second point in the case, petitioners' claim that, because of the absence of proof of the commission of any act of insolvency or contemplation of insolvency or intent to prefer them over other creditors, the receiver could in no event recover the payments made before the Comptroller of the Currency took over the bank, the Circuit Court of Appeals held that the fact that the bank never opened for business between the day of the Presidential Proclamation and its final receivership and that no attempt was made by petitioners to show any change in its condition after that date were sufficient to indicate insolvency at the time of the Proclamation (R. 175).

Specification of Errors to Be Urged.

The court below erred in holding:

1. That the question of the consequences of the *ultra vires* pledge was governed by the decisions of the federal courts rather than the New York courts.

2. That the consequences of the *ultra vires* pledge were fixed by the policy of the National Bank Act.

3. That the so-called Enabling Amendment of the National Bank Act did not adopt the decisions of the New York courts as fixing the consequences of the *ultra vires* pledge.

4. That the mere closing of the bank in the universal banking holiday under the Presidential proclamations, coupled with the taking over of the bank by the Comptroller prior to the close of the banking holiday, is evidence that the bank committed an act of insolvency, or contemplated insolvency or intended to prefer petitioners over other creditors, prior to the date that the Comptroller took over the bank, within the meaning of §91 (12 U. S. C.).

A word should be said with respect to the holding by the Circuit Court of Appeals (R. 176) that the payments made by the Conservator (as distinguished from those made by the Bank) could be recovered because made by a public official under a mistake of law. This ground for recovery does not exist unless there is a mistake of law, and if, as petitioners contended, the New York law applied, the payments instead of being made under a mistake of law were made in strict accordance with law.

Reasons for Granting the Writ.

The writ of *certiorari* should be allowed because:

I. (a) The judgment of the Circuit Court of Appeals in holding that the policy of the National Bank Act fixed the consequences of an *ultra vires* pledge, decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States, and decided it in a way which is probably in conflict with the decisions of this Court that state laws operate "upon the dealings and contracts of national banks" except where "they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were

created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States" (*McClellan* v. *Chipman*, 164 U. S. 347, 357 (1896); see also *National Bank* v. *Commonwealth*, 9 Wall. 353, 362, *supra*; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275 (1896);

(b) Even if the Circuit Court of Appeals were right in holding that the power to accept the consequences of an *ultra vires* act was a matter of the statutory authority of national banks under the National Bank Act, the judgment of that court in holding that no *ultra vires* power, even though effective under state law, could be said to be "authorized" within the meaning of that term as used by the Enabling Amendment to the National Bank Act, decided an important question of federal law which has not been, but should be, settled by this Court;

(c) The failure of the Circuit Court of Appeals to decide one of these two questions in favor of the application of the state law has resulted in a situation where the City of Mount Vernon has obtained security for its deposits from a state bank and been permitted by the New York Court of Appeals to recover its deposits in full upon insolvency (*City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400 (1936)), while the neighboring City of Yonkers, in a precisely similar relationship to a national bank, has been held in this case to be a general creditor only, all in conflict with the traditional desire of Congress to enable the national banks to compete upon a footing of equality with the state banks (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564 (1934)). We know of two other municipalities in the State of New York which obtained pledges from national banks to secure their deposits, and their cases and probably those of many others depend upon the decision in the case at bar.

II. (a) The determination of the Circuit Court of Appeals in affirming so much of the judgment of the Dis-

trict Court as allowed the receiver to recover 50% of deposits paid prior to the time the Comptroller took over the Bank is opposed to and in conflict with

(1) The determination of this Court that to recover payments as preferential under §91 (12 U. S. C.), a finding of insolvency is insufficient in the absence of proof that the payments were made after an act of insolvency or in contemplation thereof with a view to prefer one creditor to another. *McDonald* v. *Chemical National Bank*, 174 U. S. 610 (1899); *Earle* v. *Carson*, 188 U. S. 42 (1903);

(2) The determination of the Circuit Courts of Appeals for the Fifth and Third Circuits that the closing of the bank pursuant to the Presidential Proclamation declaring a banking holiday is not an act of insolvency under which payments made thereafter are preferential. *Kullman & Co.* v. *Woolley*, 83 F. 2d 129 (5th, 1936); *Richman* v. *First Methodist Episcopal Church*, 76 F. 2d 344 (3rd, 1935);

(3) The determination of the Circuit Court of Appeals for the Third Circuit that the burden of proving that a transaction is in violation of §91 is upon the receiver. *Collins* v. *School District of Borough of Trafford*, 72 F. 2d, 339 (1934).

b. The District Courts and Circuit Courts throughout the country are not in accord as to whether claims against a national bank in liquidation after the banking holiday of 1933 should be resolved as of the date of the Presidential Proclamation or as of the date on which the Comptroller of the Currency took over the Bank through a Conservator. A final determination as to which of these dates controls should be made by this Court to establish uniformity in the decisions in the courts throughout the country.

Bryce v. *National City Bank of New Rochelle*, 93 F. 2d 300 (C. C. A. 2nd, 1937);

Richman v. *First Methodist Episcopal Church*, 76 F. 2d 344 (C. C. A. 3rd, *supra*); cert. den. 296 U. S. 593;

Schram v. *Clair*, 28 F. Supp. 422 (E. D. N. Y., 1939);

Ward v. *Simon*, 23 F. Supp. 117 (E. D. Pa., 1938);

Pyne v. *Jackman*, 12 F. Supp. 653 (S. D. N. Y., 1934);

Aufderheide v. *Mine Safety Appliance Co.*, 9 F. Supp. 918 (W. D. Pa., 1934);

Sadlier v. *Lay*, 222 Misc. 64; 269 N. W. 555 (Sup. Ct. 1936);

Goess v. *Meyers*, 134 Pa. Super. 272; 4 A. 2d 184 (Sup. Ct. Pa., 1939);

Willing v. *Argosy Building & Loan Assn.*, 19 F. Supp. 353 (E. D. Pa., 1937);

Hardee v. *Washington Loan & Trust Co.*, 91 F. 2d 314 (C. A. D. C. 1937);

Dehne v. *Mine Safety Appliance Company*, 94 F. 2d 956 (C. C. A. 3rd, 1938);

Willing v. *Eveloff*, 94 F. 2d 344 (C. C. A. 3rd, 1938); cert. denied 305 U. S. 611.

Supporting Brief.

A petition for certiorari in the companion case of *The City of Yonkers* v. *Walter F. Downey*, No. 542, is being submitted to this Court contemporaneously with this petition. There is attached to the petition in the companion case a brief containing the argument of the petitioner therein in support of its reasons for granting the writ. Since the reasons and the argument in support thereof in this case are identical to those in the companion case, and since the facts in the two cases are the same except that the amounts of the deposits and withdrawals differ, we respectfully refer

the Court to the brief attached to the petition in *The City of Yonkers* v. *Walter F. Downey*, No. 542, for petitioners' argument in support of the foregoing reasons.

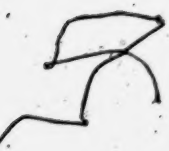
Conclusion.

The petition for review on Writ of Certiorari should be granted.

Respectfully submitted,

E. J. Dimock,
Counsel for Petitioners.

November 18, 1939.



No. 545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Petitioner,

against

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

E. J. DIMOCK,
Counsel for Petitioner.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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We respectfully refer the Court to Point I of the brief attached to the petition in *The City of Yonkers* against *Walter F. Downey* (filed contemporaneously herewith).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No.

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Petitioner,

against

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The City of Yonkers, as Trustee, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on August 22, 1939.

Opinion Below.

The opinion of the United States District Court for the Southern District of New York is not reported (R. 101, 102). The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 106 F. 2d 69 (R. 127-137).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 22, 1939 (R. 138). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938).

Question Presented.

The question presented by this petition is:

Whether the effect of an *ultra vires* pledge made by a national bank in New York to secure a deposit is determined (a) by the rule in the federal courts that the bank need not repay the deposit in order to obtain the return of the pledged securities or (b) by the rule in the New York courts that the bank must repay the deposit in order to obtain this return.

Statutes and Proclamations Involved.

The statutes and proclamations involved are set out in the Appendix to the petition and brief submitted contemporaneously herewith in the companion action of *The City of Yonkers* against *Walter F. Downey, Receiver.*

Companion Actions.

At about the time this action was instituted in the District Court, the Receiver instituted similar actions against The City of Yonkers, the Trustees of the Police Pension Fund of the City of Yonkers, and the Trustees of the Firemen's Pension Fund of the City of Yonkers. All four of the actions were tried separately, but in immediate succession. Appeals to the United States Circuit Court of Appeals for the Second Circuit were taken in all four actions simul-

taneously, and the appeals argued at the same time, the Court handing down one opinion bearing the caption of all four actions (R. 127). Petitions to this Court for a writ of certiorari are being made simultaneously in each of the four actions, the other three petitions being entitled

"The City of Yonkers, Petitioner, against *Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,"* October Term, 1939, No. 542,

"Joseph F. Loehr, Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, Petitioners, against *Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,"* October Term, 1939, No. 543, and

"Joseph F. Loehr, Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, Petitioners, against *Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation"*, October Term, 1939, No. 544.

Statement.

On July 10, 1929, the Board of Estimate and Apportionment of The City of Yonkers adopted a resolution designating certain banks as depositaries for all moneys of the City, and directing the City Treasurer to procure adequate security for all moneys deposited by him in such banks, securing the City of Yonkers against any loss of the moneys deposited and prescribing rates of interest on the general accounts which must be received (R. 66). On September 30, 1929, The First National Bank and Trust Company of

Yonkers was formed by merger of three of the depositaries named in the Resolution (R. 37).

On June 25, 1930, the so-called National Bank Enabling Amendment (12 U. S. C. 90, 46 Stat. 809) took effect. It provided:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State, in which such association is located in the case of other banking institutions in the State."

The banking practice and the accepted view of the law as to such pledges at the time of the passage of the Enabling Amendment and thereafter appear in the following quotation from the opinion of this Court written by Mr. Justice Black in *McNair* v. *Knott*, 302 U. S. 369, 371 (1937):

> "For many years Comptrollers of the Currency assumed that National banks had power to give security for public deposits and approved the practice of the banks in pledging such security. It has been, and is now, the policy of most states to require security for public funds whether deposited in State or National banks. The weight of judicial authority in the state courts has supported the doctrine that banks could pledge security for public deposits, but not for private deposits."

On February 28, 1933, the Court of Appeals of the State of New York handed down an opinion in *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, which held that a pledge by a state bank to secure a deposit was *ultra vires* but that the assets pledged could not be recovered without repaying the deposit.

On March 4, 1933, The City of Yonkers, as Trustee, had on deposit in the Bank funds in the sum of $4,971.38 in an

account entitled "Saunders Trade School Trustees Fund" (R. 77). On that day, The City of Yonkers held bonds having a par value of $535,000 which had been pledged with it in accordance with the Resolution, as security for the deposits in the above accounts, as well as for the deposits in the accounts involved in the three companion actions (R. 79).

The Governor of the State of New York proclaimed Saturday, March 4th, and Monday, March 6th, banking holidays (R. 58), and on March 6th, the President and the Governor declared a banking holiday to and including Thursday, March 9th (R. 60). On March 20, 1933, the Comptroller of the Currency appointed a Conservator of the Bank (R. 54).

On March 28, 1933, the Conservator and the City agreed that the bank would repay the deposits to the City if the City would surrender the pledged assets. By a withdrawal of deposits from the account aggregating $4,971.38, and surrenders of securities of a par value of $534,000, this agreement was carried out (R. 45).

On February 5, 1934, after the withdrawal and surrenders, the United States Supreme Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, held that a pledge by a national bank to secure a deposit was *ultra vires* and that the receiver of the bank could recover the pledged assets without paying back the deposits.

Thereafter this action and the three companion actions were brought by a Receiver who had succeeded the Conservator of the First National Bank and Trust Company of Yonkers (R. 56, 57) to recover the deposits which the Conservator had paid out in exchange for the pledged assets in so far as such deposits exceeded the 50% dividend to which the City would have been entitled as an unsecured depositor.

The cases were tried before a Judge in the United States District Court for the Southern District of New York, a jury having been waived by stipulation on the record (R. 19).

If the law as laid down by the New York State courts governed the consequences of the pledge either by its own force or by adoption by the federal statute, the repayment of the deposits and the return of the pledged securities was in strict accordance with the rights of the parties so that the plaintiff could not succeed.

If, however, the law as stated in the federal courts were applicable to the consequences of the pledge, the Conservator had overpaid the City when he paid out the deposits in full and recovered the pledged securities.

The District Court (R. 98) refused to find as Conclusions of Law that if the pledge was *ultra vires* the rights and obligations of the parties were determined by the laws of the State of New York (No. 31, R. 92) and that in order to recover the pledged assets it was necessary to repay the deposits in full (No. 32, R. 93), and that under the law of the State of New York state banks were "authorized" to give security in the case of public deposits (No. 26, R. 92).

The District Court found as a Conclusion of Law (No. 5, R. 89) that the Proclamation of March 6, 1933, did not create a presumption that the Bank was insolvent, but the court nevertheless found as a fact (No. 18, R. 80) that it was insolvent on that day.

Judgment was entered for $2,485.69, representing fifty per cent. of the moneys withdrawn after March 4, 1933, plus interest thereon from May, 1936, in the sum of $382.93, or a total of $2,919.55, including costs (R. 104).

The City excepted (R. 99) and assigned error on appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 117, 116, 110). The latter affirmed the judgment of the District Court (R. 138).

The City argued in the Circuit Court of Appeals that the New York State common law controlled the consequences of the pledge under *Erie R. R. Co. v. Tompkins*, 304 U. S. 64 (1938), because the National Bank Act (unless it incorporated the state law by reference) made no provi-

sion as to the effect of an *ultra vires* pledge of assets to secure a deposit, and, as held in *National Bank* v. *Commonwealth*, 9 Wall. 353 (1869), there was no federal common law of national banking.

The Circuit Court of Appeals denied the validity of one of the necessary steps in that argument by holding that the National Bank Act did in effect make provision as to the consequences of an *ultra vires* pledge of assets to secure a deposit. It held (R. 134) that the matter was one of national concern and that the New York rule was directly in the face of the National Bank Act. It also held that the Enabling Amendment of the National Bank Act did not incorporate the New York state law by reference because a pledge, which only existed because of the power of a New York state bank to accept the liabilities and rights that rest upon it as a consequence of the attempted exercise of a disapproved power, could not be said to be "authorized" (R. 132).

Specification of Errors to Be Urged.

The court below erred in holding:

1. That the question of the consequences of the *ultra vires* pledge was governed by the decisions of the federal courts rather than the New York courts.

2. That the consequences of the *ultra vires* pledge were fixed by the policy of the National Bank Act.

3. That the so-called Enabling Amendment of the National Bank Act did not adopt the decisions of the New York courts as fixing the consequences of the *ultra vires* pledge.

A word should be said with respect to the holding by the Circuit Court of Appeals (R. 137) that the payments made by the Conservator (as distinguished from those made by the Bank) could be recovered because made by a public official under a mistake of law. This ground for recovery

does not exist unless there is a mistake of law, and if, as the City contended, the New York law applied, the payments instead of being made under a mistake of law were made in strict accordance with law.

Reasons for Granting the Writ.

The writ of *certiorari* should be allowed because:

I. (a) The judgment of the Circuit Court of Appeals in holding that the policy of the National Bank Act fixed the consequences of an *ultra vires* pledge, decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States, and decided it in a way which is probably in conflict with the decisions of this Court that state laws operate "upon the dealings and contracts of national banks" except where "they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States" (*McClellan* v. *Chipman*, 164 U. S. 347, 357 (1896); see also *National Bank* v. *Commonwealth*, 9 Wall. 353, 362, *supra*; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275 (1896));

(b) Even if the Circuit Court of Appeals were right in holding that the power to accept the consequences of an *ultra vires* act was a matter of the statutory authority of national banks under the National Bank Act, the judgment of that court in holding that no *ultra vires* power, even though effective under state law, could be said to be "authorized" within the meaning of that term as used by the Enabling Amendment to the National Bank Act, decided an important question of federal law which has not been, but should be, settled by this Court;

(c) The failure of the Circuit Court of Appeals to decide one of these two questions in favor of the application

of the state law has resulted in a situation where the City of Mount Vernon has obtained security for its deposits from a state bank and been permitted by the New York Court of Appeals to recover its deposits in full upon insolvency (*City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400 (1936)), while the petitioner, the neighboring City of Yonkers, in a precisely similar relationship to a national bank, has been held in this case to be a general creditor only, all in conflict with the traditional desire of Congress to enable the national banks to compete upon a footing of equality with the state banks (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564 (1934)). We know of two other municipalities in the State of New York which obtained pledges from national banks to secure their deposits, and their cases and probably those of many others depend upon the decision in the case at bar.

Supporting Brief.

A petition for certiorari in the companion case of *The City of Yonkers* v. *Walter F. Downey*, No. 542, is being submitted to this Court contemporaneously with this petition. There is attached to the petition in the companion case a brief containing the argument of the petitioner therein in support of its reasons for granting the writ. The facts in that case and this case are substantially the same, except that the amounts of the deposits and withdrawals differ, and that none of the withdrawals in this case were made prior to the date on which the Comptroller took over the Bank. Since the reasons set forth above herein and the argument in support thereof are identical to some of the reasons in the companion case, we respectfully refer the Court to Point I of the brief attached to the petition in *The City of Yonkers* v. *Walter F. Downey*, No. 542, for petitioners' argument in support of the foregoing reasons. Point II of the brief in the companion case is not material

here, since none of the deposits involved in this case were withdrawn prior to the date on which the Comptroller took over the Bank.

Conclusion

The petition for review on Writ of Certiorari should be granted.

Respectfully submitted,

E. J. Dimock,
Counsel for Petitioner.

November 18, 1939.

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FILED
JAN 15 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 542

THE CITY OF YONKERS,

Petitioner,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

No. 543

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

No. 544

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Petitioners;

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

No. 545

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Petitioner,

against

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

E. J. DIMOCK,
Counsel for Petitioners.

LEONARD G. MCANENY,
J. DONALD RAWLINGS,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 542

THE CITY OF YONKERS,

Petitioner,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

No. 543

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

No. 544

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

No. 545

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Petitioner,

against

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York is reported in 23 Fed. Supp. 1018 (R. 187-196). The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 106 F. 2d 69 (R. 224-234).

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on August 22, 1939 (R. 235; P. R. 182; F. R. 177; S. R. 138). The petitions for certiorari were filed on November 20, 1939, and certiorari granted on December 18, 1939 (84 L. ed. 250). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Presented.

The questions presented by these writs are two:

1. Whether the effect of an *ultra vires* pledge made by a national bank in New York to secure a deposit of public funds is determined (a) by the rule in the federal courts that the bank need not repay the deposit in order to obtain the return of the pledged securities or (b) by the rule in the New York courts that the bank must repay the deposit in order to obtain this return.

2. Whether payments made by a bank to a depositor in accordance with the Presidential Proclamation after the banking holiday of March 6, 1933, but before the bank was taken over by the Comptroller of the Currency, can be recovered as preferential without any proof that the pay-

ments were made after the commission of an act of insolvency or in contemplation of an act of insolvency, or proof that the payments were made with the intent of creating a preference.

Statutes and Proclamations Involved.

The statutes and proclamations involved are set out in Appendix, *infra*, pages 34 to 39.

Companion Actions.

These are four companion actions instituted in the District Court by the Receiver against (1) the City of Yonkers, (2) the Trustees of the Police Pension Fund of the City of Yonkers, (3) the Trustees of the Firemen's Pension Fund of the City of Yonkers, and (4) The City of Yonkers, as Trustee of the "Saunders Trade School Fund". All four of the actions were tried separately, but in immediate succession. Appeals to the United States Circuit Court of Appeals for the Second Circuit were taken in all four actions simultaneously, and the appeals argued at the same time, the Court handing down one opinion bearing the caption of all four actions (R. 224). Petitions to this Court for a writ of certiorari were made and granted simultaneously in each of the four actions.

References to the Record in the City case (542) are designated by a simple "R", to the Police case (543) by "P. R.", to the Firemen's case (544) by "F. R." and to the School case (545) by "S. R."

Statement.

On July 10, 1929, the Board of Estimate and Apportionment of The City of Yonkers adopted a resolution designating certain banks as depositaries for all moneys of the City, and directing the City Treasurer to procure adequate

security for all moneys deposited by him in such banks, securing the City of Yonkers against any loss of the moneys deposited and prescribing rates of interest on the general accounts which must be received (R. 154). On September 30, 1929, The First National Bank and Trust Company of Yonkers was formed by merger of three of the depositaries named in the Resolution (R. 40, 161, 164).

On June 25, 1930, the so-called National Bank Enabling Amendment (12 U. S. C. 90, 46 Stat. 809) took effect. It provided:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State, in which such association is located in the case of other banking institutions in the State."

The banking practice and the accepted view of the law as to such pledges at the time of the passage of the Enabling Amendment and thereafter appear in the following quotation from the opinion of this Court written by Mr. Justice Black in *McNair* v. *Knott*, 302 U. S. 369, 371 (1937):

> "For many years Comptrollers of the Currency assumed that National banks had power to give security for public deposits and approved the practice of the banks in pledging such security. It has been, and is now, the policy of most states to require security for public funds whether deposited in State or National banks. The weight of judicial authority in the state courts has supported the doctrine that banks could pledge security for public deposits, but not for private deposits."

On February 28, 1933, the Court of Appeals of the State of New York handed down an opinion in *State Bank of*

Commerce v. *Stone*, 261 N. Y. 175, which held that a pledge by a state bank to secure a deposit was *ultra vires* but that the assets pledged could not be recovered without repaying the deposit.

On March 4, 1933, the petitioners had on deposit in the Bank funds as follows:

The petitioner in the City case had $275,105.53 in an account entitled, "Treasurer, City of Yonkers" (R. 94, 164, 165), and in the sum of $1,502.84 in an account entitled "City of Yonkers" (R. 141, 164, 165), and in the sum of $621.88 in an account entitled, "Nepperhan Sewer Fund, City of Yonkers" (R. 142, 164, 165).

The petitioners in the Police case had $29,233.67 in an account entitled, "Police Pension Fund, City of Yonkers" (P. R. 119), and in the sum of $50 in an account entitled, "City of Yonkers, Police Pension Fund" (P. R. 119).

The petitioners in the Firemen's case had $16,590.75 in an account entitled, "Firemen's Pension Fund, City of Yonkers" (F. R. 117).

The petitioner in the School case had $4,971.38 in an account entitled, "Saunders Trade School Trustees Fund" (S. R. 77).

On that day, The City of Yonkers held bonds having a par value of $535,000 which had been pledged with it in accordance with the Resolution, as security for the deposits in the above accounts (R. 70, 152, 153, 164, P. R. 118, F. R. 116, S. R. 79).

The Governor of the State of New York proclaimed Saturday, March 4th, and Monday, March 6th, banking holidays (R. 85), and on March 6th, the President and the Governor declared a banking holiday to and including Thursday, March 9th (R. 87). During this period and up to March 20, 1933, The First National Bank and Trust Company was under the management and control of its own

officers, but under restrictions imposed upon it and all other banks (R. 31). While the Bank was under the control of its officers and before the appointment of a Conservator, checks of the following description were honored and paid out of the following described accounts by the Bank:

Payroll checks issued by the petitioner in the City case aggregating $89,226.06 were honored and paid out of the account denominated "Treasurer, City of Yonkers" (R. 166, 167, 181).

Pension checks issued by petitioners in the Police case aggregating $566.67 were honored and paid out of the account denominated "Police Pension Fund, City of Yonkers" (P. R. 121, 135).

Pension checks issued by petitioners in the Firemen's case aggregating $150 were honored and paid out of the account denominated "Firemen's Pension Fund, City of Yonkers" (F. R. 118).

On March 20, 1933, the Comptroller of the Currency appointed a Conservator of the Bank. Between March 20, 1933, and March 28, 1933, checks of the following description were honored and paid out of the following described accounts by the Bank:

Payroll checks issued by petitioner in the City case aggregating $67,735.99 were honored and paid out of the account denominated "Treasurer, City of Yonkers" (R. 167, 181).

Pension checks issued by petitioners in the Police case aggregating $520.83 were honored and paid out of the account denominated, "Police Pension Fund, City of Yonkers" (P. R. 121, 135).

On March 28, 1933, the Conservator and the City agreed that the bank would repay the deposits to the City if the City would surrender the pledged assets. This agreement was carried out by the surrender of securities of the par

value of $534,000 (R. 72, 155) and withdrawals of the following deposits:

Withdrawals from the three accounts involved in the City case aggregating $120,141.71, making a total of $277,103.76 of deposits withdrawn from those accounts (R. 168, 169, 170, 181, 182).

Withdrawals from the accounts in the Police case aggregating $28,196.17, making a total of $29,283.67 of deposits withdrawn from those accounts (P. R. 122-124, inc.).

Withdrawals from the account in the Firemen's case aggregating $16,440.75, making a total of $16,590.75 of deposits withdrawn from that account (F. R. 118, 119, 131).

Withdrawal from the account in the School case of $4,971.38 (S. R. 86).

On February 5, 1934, after all of these withdrawals and surrenders, the United States Supreme Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, held that a pledge by a national bank to secure a deposit was *ultra vires* and that the receiver of the bank could recover the pledged assets without paying back the deposits.

Thereafter these actions were brought by a Receiver who had succeeded the Conservator of the First National Bank and Trust Company of Yonkers (R. 83, 84, P. R. 87, F. R. 87, S. R. 56, 57) to recover the deposits which the Bank had paid out on payroll and pension checks and the deposits which the Conservator had paid out in exchange for the pledged assets in so far as such deposits exceeded the 50% dividend to which the City would have been entitled as an unsecured depositor.

The cases were tried before a Judge in the United States District Court for the Southern District of New York, a jury having been waived by stipulation on the record (R. 27, 28, P. R. 29, F. R. 23, S. R. 19).

If the law as laid down by the New York State courts governed the consequences of the pledge either by its own force or by adoption by the federal statute, the repayment of the deposits and the return of the pledged securities was in strict accordance with the rights of the parties so that the plaintiff could not succeed.

If, however, the law as stated in the federal courts were applicable to the consequences of the pledge, the Conservator had overpaid the City when he paid out the deposits in full and recovered the pledged securities.

Even if the repayment of the deposits had not been justified by the existence of the pledge, the Receiver could not recover without proof that the payments by the Bank were made after the commission of an act of insolvency, or in contemplation of an act of insolvency, and proof that the payments were made with the intent to prefer the City over other creditors.

The District Court (R. 184, P. R. 137, F. R. 133, S. R. 98) refused to find as Conclusions of Law that if the pledge was *ultra vires* the rights and obligations of the parties were determined by the laws of the State of New York (No. 33, R. 177, P. R. 131, F. R. 127, No. 31, S. R. 92) and that in order to recover the pledged assets it was necessary to repay the deposits in full (No. 34, R. 177, P. R. 131, F. R. 127, No. 32, S. R. 93), and that under the law of the State of New York state banks were "authorized" to give security in the case of public deposits (No. 28, R. 176, P. R. 130, F. R. 126, No. 26, S. R. 92).

The District Court found as a Conclusion of Law (No. 4, R. 173, P. R. 127, F. R. 123, No. 5, S. R. 89) that the Proclamation of March 3, 1933, did not create a presumption that the Bank was insolvent, but the court nevertheless found as a fact (No. 2, R. 159, No. 20, P. R. 107, No. 20, F. R. 106, No. 18, S. R. 80) that it was insolvent on that day.

Judgment was entered in the four cases as follows, representing 50% of the moneys withdrawn after March 4, 1933, plus interest thereon from May, 1936:

In the City case, judgment for $138,551.88, plus interest of $21,344.71, or a total of $159,970.74, including costs (R. 197, 198).

In the Police case, judgment for $14,641.84, plus interest of $2,255.73, or a total of $16,970.42, including costs (P. R. 143).

In the Firemen's case, judgment for $8,295.38, plus interest of $1,277.98, or a total of $9,651.21, including costs (F. R. 139).

In the School case, judgment for $2,485.69, plus interest of $382.93, or a total of $2,919.55, including costs (S. R. 104).

The petitioners excepted (R. 185, P. R. 138, F. R. 134, S. R. 99) and assigned error on appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 210, 209, 203, P. R. 158, 159, 150, F. R. 154, 153, 146, S. R. 117, 116, 110). The latter affirmed the judgment of the District Court (R. 235; P. R. 182; F. R. 177; S. R. 138).

The City argued in the Circuit Court of Appeals that the New York State common law controlled the consequences of the pledge under *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), because the National Bank Act (unless it incorporated the state law by reference) made no provision as to the effect of an *ultra vires* pledge of assets to secure a deposit, and, as held in *National Bank* v. *Commonwealth*, 9 Wall. 353 (1869), there was no federal common law of national banking.

The Circuit Court of Appeals denied the validity of one of the necessary steps in that argument by holding that the National Bank Act did in effect make provision as to the consequences of an *ultra vires* pledge of assets to secure a deposit. It held (R. 231) that the matter was one of national concern and that the New York rule was directly in the face of the National Bank Act. It also held that the Enabling Amendment of the National Bank Act did not incorporate the New York state law by reference because

a pledge, which only existed because of the power of a New York state bank to accept the liabilities and rights thrust upon it as a consequence of the attempted exercise of a disapproved power, could not be said to be "authorized" (R. 229).

On the second point in the case, the City's claim that, because of the absence of proof of the commission of any act of insolvency or contemplation of an act of insolvency or intent to prefer the City over other creditors, the receiver could in no event recover the payments made before the Comptroller of the Currency took over the bank, the Circuit Court of Appeals held that the facts that the bank never opened for business between the day of the Presidential Proclamation and its final receivership on January 23, 1934, and that no attempt was made by the City to show any change in its condition after that date were sufficient to indicate insolvency at the time of the Proclamation (R. 233).

Specification of Errors to Be Urged.

The Court below erred in holding:

1. That the question of the consequences of the *ultra vires* pledge was governed by the decisions of the federal courts rather than the New York courts.

2. That the consequences of the *ultra vires* pledge were fixed by the policy of the National Bank Act.

3. That the so-called Enabling Amendment of the National Bank Act did not adopt the decisions of the New York courts as fixing the consequences of the *ultra vires* pledge.

4. That the mere closing of the bank in the universal banking holiday under the Presidential proclamations, coupled with the taking over of the bank by the Comptroller prior to the close of the banking holiday, is evidence that the bank committed an act of insolvency, or contemplated

an act of insolvency or intended to prefer the City over other creditors, prior to the date that the Comptroller took over the bank, within the meaning of §91 (12 U. S. C.).

5. That the judgments of the District Court should be affirmed.

A word should be said with respect to the holding by the Circuit Court of Appeals (R. 254) that the payments made by the Conservator (as distinguished from those made by the Bank) could be recovered because made by a public official under a mistake of law. This ground for recovery does not exist unless there is a mistake of law, and if, as the City contended, the New York law applied, the payments instead of being made under a mistake of law were made in strict accordance with law.

SUMMARY OF ARGUMENT.

POINT I.

Even though the Bank was insolvent, the City was entitled to hold the security until payment of its deposits in full. Since that is just what the City did, the deposits cannot be recovered from it.

(a) The Common Law of the State of New York by its own Inherent Force Controls the Consequences of the Pledge.

In New York, a pledge by a state bank to secure a deposit is *ultra vires* but the security cannot be recovered by the bank without repaying the deposit. (*State Bank of Commerce* v. *Stone*, 261 N. Y. 175, *supra*). Under the federal decisions, such a pledge by a national bank is likewise *ultra vires* but the security pledged can be recovered by the bank without repaying the deposit. (*Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, *supra*.)

The position of the City is that the New York law fixes the consequences of such a pledge made by a national bank

in New York because there is no federal statute law on the subject and there is no federal common law. (*Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, *supra*).

The Circuit Court of Appeals held that there was a federal statute on the subject in the sense that *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, *supra*, which enunciated the federal rule, in effect construed the National Bank Act as embodying that rule.

That was not the effect of the decision in the *Pottorff* case. The point in question was the third numbered point in the opinion. In that third point, no reference was made to the policy of the National Bank Act, but, on the contrary, the result was reached upon the authority of cases dealing with general corporation law. This Court cited *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, *supra*, the case which founded the New York doctrine, as *contra* instead of distinguishing the *Pottorff* case as one construing a different statute.

In the absence of a federal statute on the effect of an *ultra vires* pledge by a national bank, that effect would be ascertained by applying the familiar rule that the question whether an act is *ultra vires* is governed by the law of incorporation and the question of the effect of the *ultra vires* act is governed by the law of the state where the act is done. (Restatement of the Law of Conflict of Laws, Section 166, subdivision c. of the Comment).

The effect of the silence of the National Bank Act on the subject would be, therefore, that national banks and state banks would compete on an equal footing in so far as the effect of *ultra vires* acts was concerned. Thus, the prescribing of a special statutory rule for the national banks would be a departure from the traditional congressional policy toward placing the national banks on equality with the state banks. (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564 (1934)).

The state law always governs the transactions of national banks except where in conflict with some paramount

federal law. (*National Bank* v. *Commonwealth*, 9 Wall. 353, 362, *supra*; *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, *supra*). Thus, if the National Bank Act is to override the law of the State of New York as to the consequences of an *ultra vires* pledge, it must not only indicate a general policy of Congress that an *ultra vires* act of a national bank shall be without force or effect but also indicate that Congress has actually supplanted the state law on the subject. Nothing in the National Bank Act indicates either of those things. Therefore, the consequences of an *ultra vires* act of a national bank are determined by the law of the state where it occurs. (*Security National Bank* v. *St. Croix Power Co.*, 117 Wis. 211, 94 N. W. 74 (1903)).

Incidentally, the result sought by the petitioners did not involve the recognition of a state law lien *arising on insolvency*, which is properly held to create an invalid preference. (*Old Company's Lehigh Inc.* v. *Meeker*, 294 U. S. 227 (1935)). The lien on the security arose when the security was taken, long before insolvency, and such a lien, although created by state law, is effective as applied to national banks. (*Scott* v. *Armstrong*, 146 U. S. 499, 510 (1892)).

Summary of

(b) The New York Law as to the Consequences of the Pledge was Incorporated in the National Bank Act by Reference.

The Enabling Amendment of June 25, 1930 (12 U. S. C. 90, Appendix, p. 37), provides that a national bank may give security for deposits of "public money of a state or any political subdivision thereof * * * of the same kind as is authorized by the law of the state * * * in the case of other banking institutions in the state."

All of the money here involved was public money of a political subdivision of the state, so that if it can be said that the result of the New York decisions is that a state

bank "is authorized by the law of the state" to give security for deposits, even though *ultra vires*, then that law is incorporated by reference in the National Bank Act by force of the Enabling Amendment, with the result that a national bank in New York is under the same obligation as a state bank to pay secured public deposits when recovering the security.

The question is whether Congress by the words "authorized security" intended to exclude security which is authorized by the decisions of the State of New York just because it results from a transaction disapproved by the legislature of the State of New York.

In spite of the apparent contradiction in terms, both the federal and state courts agree that corporations have power to perform certain acts which are outside of their powers. (*First National Bank of Aiken* v. *Mott Iron Works*, 258 U. S. 24[illegible] (1922); *Pullman's Palace-Car Co.*, v. *Central Transportation Co.*, 171 U. S. 138 (1898); *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, *supra*). In other words, a corporation has *de facto* powers to accept the liabilities and rights thrust upon it by the local law as consequences of the attempted exercise of disapproved powers. It is inescapable that every time a court of the state of incorporation holds a corporation for the consequences of an *ultra vires* act, it holds that the corporation is "authorized" to accept them. Thus, the Circuit Court of Appeals was wrong in limiting the expression "authorized security" to security authorized *de jure*.

An explanation for the choice by Congress of the word "authorized" appears if we assume that the Circuit Court of Appeals were right in the other branch of the case in holding that the National Bank Act should be construed as so clearly decreeing that *ultra vires* pledges should be null and void as to leave no room for the application of the state law on the subject.

Any hesitation that one may have about applying the word "authorized" to *de facto* powers of a corporation arises from our habitual association of authorization with the legislature. Since these powers to accept the conse-

quences of *ultra vires* acts are usually given by judicial decision, they do not generally fit into the class of powers authorized by the legislature. Here, however, by hypothesis, Congress has treated these powers to accept the consequences of *ultra vires* acts as the subject of legislative action so that the word "authorized" is a natural one for Congress to apply to them.

Thus, the expression security "authorized by law" when used by Congress with reference to state banks was at worst equivocal. In the light of the Congressional policy of equality between national and state banks, the construction should be chosen which adopts the law that the state courts apply to security given *ultra vires* by the state banks. It is impossible to conceive of any intelligible motive that Congress might have had for giving the national banks the *de jure* powers of the state banks with regard to public deposits and withholding the *de facto* powers of state banks.

The situation now existing in the State of New York, as a result of the decision below, is a perfect example of the handicap which the national banks, in their competition with the state banks, suffer from failure to give to the transactions of the national banks the same effect which the laws of the state where they are doing business give to the state banks. The fiscal officers of the municipalities of the State of New York know that the City of Yonkers deposited its funds in a national bank and took security and that the City of Mount Vernon deposited its funds in a state bank and took security and that the courts have since decided that the City of Yonkers must return its security without being paid in full while the City of Mount Vernon may hold its security until full payment of the deposits. (*City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400 (1936)).

Summary of

POINT II.

The deposits paid out upon checks of the City prior to the date that the Comptroller took over the Bank cannot be recovered by the Receiver even if the security is unenforceable.

Large sums were paid out by the Bank on checks of the petitioners between the institution of the Presidential bank holiday and the appointment of the Conservator. These payments were made in the regular course of business and without infringing the restrictions placed upon banks during the holiday.

Section 91 of Title 12 U. S. C. (R. S. §5242, printed in full in the Appendix, p. 38), is the only authority for recovery of payments as preferential and is the authority under which the Circuit Court of Appeals held that these payments were recoverable. It provides, in substance, that all payments of money "made after the commission of an act of insolvency, or in contemplation thereof, made * * * with a view to the preference of one creditor to another, * * * shall be utterly null and void, * * *."

The Circuit Court of Appeals held (R. 233-234) that the fact that the Bank never opened for regular business after March 4, 1933, and that no attempt was made by the petitioners to show any change in the Bank's condition after March 4, 1933, indicated that the Bank would not be able to pay its depositors in due course and that the trial court could properly draw the inference that the payments were in violation of Section 91.

This clearly exhibits a misapprehension of the scope of Section 91. Mere insolvency at the time payments are made so that they inevitably amount to preferences is insufficient

to warrant their recovery under Section 91. There must be an act of insolvency or contemplation of an act of insolvency and a payment other than one in the regular course of business. (*McDonald* v. *Chemical National Bank*, 174 U. S. 610 (1899)).

Neither the receiver nor the Circuit Court of Appeals made any contention that the restriction of business of all of the banks in the United States pursuant to the Presidential Proclamation amounted to an act of insolvency for such of those as thereafter failed to reopen. Such a contention, if made, would have been satisfactorily answered by the opinions in two cases which have been decided to the contrary; *Kullman & Co.* v. *Woolley*, 83 F. 2d 12 (C. C. A. 5th, 1936); *Richman* v. *First Methodist Episcopal Church*, 76 F. 2d 344 (C. C. A. 3rd, 1935).

Thus, as to the payments made by the Bank before the appointment of the Conservator, which was the first act of insolvency, the petitioners were entitled to treat them as valid, irrespective of the validity of any security held for the deposits.

ARGUMENT.

POINT I.

Even though the Bank was insolvent, the City was entitled to hold the security until payment of its deposits in full. Since that is just what the City did, the deposits cannot be recovered from it.

a. The Common Law of the State of New York by its own Inherent Force Controls the Consequences of the Pledge.

It is the common law of the State of New York that a pledge by a state bank to secure a deposit is *ultra vires* but the assets pledged cannot be recovered by the bank without repaying the deposit. (*State Bank of Commerce* v. *Stone*,

261 N. Y. 175 (*supra*)). In *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245 (*supra*), this Court held that such a pledge by a national bank was likewise *ultra vires* but that the assets pledged could be recovered without repaying the deposit, "in the absence of an identifiable *res* and a constructive trust based on special circumstances of misconduct" (p. 261).

The position of the City is, and was in the courts below, that the National Bank Act (unless it incorporates the state law by reference) makes no provision as to the effect of an *ultra vires* pledge of assets to secure a deposit, that there is no federal common law of national banking and that therefore we must look at the law of the state where the transaction took place to ascertain the effect of an *ultra vires* pledge—first, at its statute law, and, second, in the absence of statute law upon the subject, at its common law. This last step, resort to state common law in federal court litigation rather than to federal common law, is based upon the recent decision of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (*supra*), which overruled *Swift* v. *Tyson*, 16 Pet. 1 (1842).

The District Court brushed this argument aside, saying (fol. 583):

> "The instant case does not come within the purview of *Erie Ry. Co.* v. *Harry J. Tompkins*, decided April 25, 1938, unreported. The regulation of the conduct of federal banks is peculiarly in the power of the federal government."

The Circuit Court of Appeals took the same position. It attempted to avoid the fundamental proposition of our argument that the federal statute was silent on the subject, by saying (R. 231) that the decision of the Supreme Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 260, 261 (*supra*), was based upon an interpretation of the National Bank Act as prohibiting a depositor from retaining,

until his deposit was repaid, securities which had been pledged to him *ultra vires*.

We do not agree with the court below that the United States Supreme Court, in the *Pottorff* case, when it refused to give any effect to the *ultra vires* pledge, was construing the National Bank Act. It was applying "federal common law". Mr. Justice Brandeis was very careful to divide his opinion into three parts, preceded by three ordinal numerals in italics. *First*, came the question of *ultra vires*, and it was there (p. 253) that he discussed the policy of other provisions of the statute with respect to ratable distribution in insolvency as forming a basis for the conclusion that the pledging of assets to secure deposits was *ultra vires*. In the *second* point (p. 260), he held that the circumstances under which the pledge had been made in that case did not create an estoppel, and in the *third* point (p. 261), he held that the *ultra vires* pledge did not result in the consequence that the depositor might hold the pledged assets until his deposit was repaid, because an identifiable *res* and a constructive trust based on special circumstances were essential. In neither the second nor the third points was a word said about the policy of the statute. The New York case (*State Bank of Commerce* v. *Stone*, 261 N. Y. 175, *supra*) was simply cited as *contra* with no attempt to distinguish the *Pottorff* case as one construing a statute. The cases cited as supporting the result reached were not limited to decisions under the National Bank Act but were on the general subject of the effect of an *ultra vires* act. The last two points were decided as a matter of *federal common law* in the absence of a state statute which, even before the decision of *Erie R. R. Co.* v. *Tompkins*, would have been controlling under the familiar rule that, while the law of incorporation determines whether or not a transaction is *ultra vires*, the law of the place of the *ultra vires* transaction determines its effect.

That rule is well stated in the Restatement of the Law of Conflict of Laws. In subdivision c. of the comment under

§ 166, it states that "If an act which is outside the purposes of incorporation (see § 156) or which is prohibited either by the state of incorporation or by the state where the act is to be done (see § 165) is directed to be done by the corporation, the effect of the performance of such an act on behalf of the corporation is governed by the law of the state where the act is done."

Even in the federal courts the local law which now determines the effect of an *ultra vires* pledge is the state statute or the state common law, just as before *Erie R. R. Co.* v. *Tompkins* it used to be the state statute or federal common law. "Federal common law" has, since the decision in *Erie R. R. Co.* v. *Tompkins*, no sway over *ultra vires* pledges except those made in the territories or in the District of Columbia or in some state which has no statutes or decisions declaring the law as to the consequences of an *ultra vires* pledge.

We do not understand the Circuit Court of Appeals to quarrel with the proposition that if federal common law were all that was involved, the mere citation of *Erie R. R. Co.* v. *Tompkins*, would brush it aside and bring into play in its stead the New York state law on the consequences of the *ultra vires* pledge. The Circuit Court of Appeals controverts our statement that the National Bank Act is silent as to the effect of the *ultra vires* pledge. It says that Congress has, by implication, declared that the state law shall give no effect to *ultra vires* pledges where national banks are concerned.

The difference between us is, therefore, that the City construes the National Bank Act as being silent on the subject of the effect of the *ultra vires* pledge while the Circuit Court of Appeals construes it as impliedly declaring that such a pledge shall have no effect.

The construction urged by the City is in harmony with the long established policy of Congress toward placing the national banks upon an equal footing with the state banks in the states where they operate. (*Lewis* v. *Fidelity &*

Deposit Co., 292 U. S. 559, 564, *supra*.) Every time that the courts adopt a construction of the National Bank Act which applies state law to the transactions of the bank, it enables the national banks to compete upon an equal footing with the state banks, and every time that, as here, the courts adopt a special rule for national banks, they run the risk of putting the national banks at a disadvantage in their competition with the state banks.

An intention to supersede the state law as to the effect of the transactions of a national bank is not lightly to be imputed to Congress. The national banking power is not an expressly enumerated one and exists only as an incident of sovereignty. (*M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819)). This Court, in *National Bank* v. *Commonwealth*, 9 Wall. 353, 362 (*supra*), held that it followed therefore that "It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." It may be that the decisions have grown a little more liberal toward the power of Congress, by the enactment of express legislation, to supplant the operation of state laws upon the transactions of national banks, but it still holds true that "a national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law." (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 566, *supra*; see also *First National Bank* v. *Missouri*, 263 U. S. 640, 656 (1924); *McClellan* v. *Chipman*, 164 U. S. 347, 357 (1896)).

Thus, in order to reach the result that federal law controlled this question as to the effect of an *ultra vires* pledge by a national bank to secure deposits, it was not enough for the courts below to conclude that, if Congress had prescribed the effect of an *ultra vires* pledge, Congress would have made an *ultra vires* pledge null and void. The courts had to find not only the general policy of Congress on such a question but also that Congress had ousted the state law by enacting that policy into an applicable statute and had

thus preempted the field as against state law as to the consequences of an *ultra vires* pledge by a national bank to secure deposits.

We submit that nothing in the National Bank Act indicates an intention on the part of Congress to invade the field of the local law in prescribing the effect to be given to an *ultra vires* pledge. We concede that except where the state law is expressly adopted by Congress, the National Bank Act as construed by the federal courts is the only source upon which we can draw in order to determine whether a given act of a national bank is *intra vires* or *ultra vires*, as those terms are ordinarily used, but unless Congress by an unmistakable exercise of its paramount power in the national banking field invades what would otherwise be the domain of the state, the consequences of such an *ultra vires* act are determined by the law of the state where it occurs. (*Security National Bank* v. *St. Croix Power Co.*, 117 Wis. 211, 94 N. W. 74, *supra*.) No such invasion has been made by Congress.

Incidentally it is to be noted that the acceptance of the state law as to the effect of the *ultra vires* pledge does not result in a state-law lien *arising on insolvency* of the kind properly held invalid so far as national banks are concerned. (*Old Company's Lehigh Inc.* v. *Meeker*, 294 U. S. 227, *supra*; *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216 (1935)). The lien on the security to the extent of the deposits exists from the instant the security is taken. Such a lien, though created by state law, is effective as applied to national banks (*Scott* v. *Armstrong*, 146 U. S. 499, 510, *supra*; *Willing* v. *Binenstock*, 302 U. S. 272, 276 (1937); *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 568, *supra*). The Circuit Court of Appeals distinguished these cases (R. 232) only on the theory that the lien in the case at bar is invalid because it is in "conflict with the policy of the Bank Act". But that is the very question here at issue. We submit that we have shown that the National Bank Act has not invaded the field of state law so as to make any such policy effective.

b. The New York Law as to the Consequences of the Pledge was Incorporated in the National Bank Act by Reference.

The so-called Enabling Amendment of June 25, 1930 (12 U. S. C. §90, Appendix, p. 37) provides:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

It appears therefrom that the security which a national bank may give for "public money of a State or any political subdivision thereof" is security "of the same kind as is authorized by the law of the State" in the case of other banking institutions in the State.

All of the money here involved is "public money" of a "political subdivision of the State". It was so conceded by the receiver in No. 542 and so found by the District Judge (R. 47, 165, 181). In Nos. 543, 544 and 545 the District Judge refused to so find saying it was not necessary to do so (P. R. 141, 126, 136; F. R. 137, 123, 132; S. R. 102, 89, 97). The laws creating the Police and Firemen's pension funds involved in Nos. 543 and 544 are local laws of the City of Yonkers and are set forth in the records (P. R. 109-118; F. R. 108-116). The beneficiaries have no property interest in the funds. Indeed they have not even a contractual interest in them. (*People ex rel. Devery* v. *Coler*, 173 N. Y. 103 (1903), *Dodge* v. *Board of Education*, 302 U. S. 74 (1937).) The Saunders Trade School Fund involved in No. 545 is simply a segregation of funds held by the City as Trustee of a trust for its trade schools. The money in the account constitutes revenues to the City just as do taxes, and is used in meeting the expenditures provided in the budget for Trade Schools (S. R. 65, 67-71).

The fact that the use of funds held by the public is restricted, does not prevent them from being public funds. See *Smith* v. *U. S.*, 170 U. S. 372 (1898), at pages 377, 379, 380.

If it can be said that the result of the New York decisions is that a New York state bank "is authorized by the law of the State" to give security for deposits, which, although it is recoverable whenever the bank or the Superintendent of Banks elects to pay back the deposits, may nevertheless be held by the depositor until such payment, then that law is picked up by the Enabling Amendment and made part of the National Bank Act and a national bank in New York has the same authority with respect to public deposits.

The problem of course is whether the Enabling Amendment, by the use of the words "authorized" security, included security, the giving of which was said by the state court to be *ultra vires* but, nevertheless, enforcible to a limited extent. The Circuit Court of Appeals has, in substance, held that the scope of the expression "authorized security" is so limited as to exclude security which is authorized by judicial decisions of the State of New York but which results from a transaction disapproved by the legislature of the State of New York.

Unless this limitation is to be applied to the significance of the expression "authorized security", Congress adopted and applied to national banks not only the state law as to what pledges are *intra vires* for state banks but also the state law as to the effect of *ultra vires* pledges by state banks.

No subject is more difficult to discuss than that of *ultra vires*. There seems to be a contradiction in terms in saying that a corporation has *power* to perform an act which is outside of its *powers*. Yet both the federal and state courts have held in effect that national and state banks have such power (*First National Bank of Aiken* v. *Mott Iron Works*, 258 U. S. 240, *supra*; *Citizens' Central National Bank* v. *Appleton*, 216 U. S. 196 (1910); *Pullman's Palace-Car Co.*,

v. *Central Transportation Co.*, 111 U. S. 138, *supra*; *Aldrich* v. *Chemical National Bank*, 176 U. S. 618 (1900); *Logan County National Bank* v. *Townsend*, 139 U. S. 67 (1891); *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, *supra*). It was perhaps to avoid that contradiction in terms that the profession preferred to use Latin and say that a corporation had power to perform an "*ultra vires*" act. But however it is to be expressed, there is no doubt that a corporation, as pointed out by the Circuit Court of Appeals (R. 231), has at least two kinds of powers. These powers are, on the one hand, approved powers, and, on the other, powers to accept the liabilities and rights thrust upon the corporation by the local law as consequences of the attempted exercise of disapproved powers. The first class may be referred to as *de jure* powers, and the second as *de facto* powers.

This analysis by the Circuit Court of Appeals in this case reveals that in every case where the law of the incorporating jurisdiction holds a corporation for the consequences of an *ultra vires* act, it does two things: First, it lays down those particular consequences as resulting from the *ultra vires* act, and, second, and necessarily, it holds that the corporation has power to accept those consequences. Accordingly, every time a court of the state of incorporation holds a corporation for the consequences of an *ultra vires* act, it holds that the corporation is "authorized" to accept them.

If Congress was using the word "authorized" in the Enabling Amendment in that sense, then the Enabling Amendment ordained that national banks should not only have all of the *intra vires* powers of competing state banks but also such powers to accept the consequences of their *ultra vires* acts as were ordained by the judicial decisions of their state of incorporation.

The Circuit Court of Appeals was mistaken in saying (R. 229) that "The parties conceded that the law of New York with respect to an *ultra vires* pledge did not bring

the pledges here within the Act of June 25, 1930" (the Enabling Amendment). We did not so concede below nor do we so concede now.

The Circuit Court of Appeals says in its opinion (R. 229) that "a pledge which is '*ultra vires*' cannot be said to be 'authorized'." This overlooks the point so clearly brought out by the court itself that the capacity to accept the consequences of an *ultra vires* act is itself a power. Were we speaking of rights and liabilities thrust upon a foreign corporation by the courts of another jurisdiction as a consequence of an *ultra vires* act, it might be inapt to say that the corporation was "authorized" to accept those consequences. When the courts of the state of incorporation, however, as they do here, thrust these rights and liabilities upon a state bank, the law of that state both creates the rights and liabilities and gives the power to accept them. "Giving" a power is but another word for "authorizing" its exercise.

Another reason why the word "authorized" may seem not to include the *de facto* power to accept the consequences of an *ultra vires* act is that most of us think of "authorized" powers as those which owe their existence or non-existence to the express or implied will of the Legislature, and think of these *de facto* powers as owing nothing to the legislative will for their existence or non-existence. Congress, however, according to the Circuit Court of Appeals, voluntarily and deliberately decreed in the original part of the National Bank Act the non-existence of a certain *de facto* power—the power to accept the consequences of a disapproved pledge to secure deposits. Thus, Congress, the very body which used this word "authorized" in the Enabling Amendment, thinks of these *de facto* powers as being within the class where existence or non-existence depends on the expressed or implied will of the Legislature. Hence, to Congress, "authorized" powers include those *de facto* powers where there is no expressed or implied legislative decree of non-existence. To the mind of Con-

gress, an implied *de facto* power, implied because not denounced by the Legislature, is as truly "authorized" as an implied *de jure* power is "authorized".

Thus the expression, security "authorized by law", when used by Congress with reference to state banks, was, at worst, equivocal. The expression might have referred only to *intra vires* security or it might have included *ultra vires* security which the local law authorized the state bank to recognize. If, by following the Blackstonian canon of construction, to consider the old law and the mischief, we find that the natural intent of Congress would have been to apply the broader interpretation to the word "authorized", we may conclude that Congress did so.

It is settled that the purpose of the adoption of the Enabling Amendment was to enable national banks to compete with state banks for public deposits. (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564, *supra.*) As appeared from the quotation from the opinion in *McNair* v. *Knott*, 302 U. S. 369, at page 4 of the foregoing statement, a majority of the states permitted pledges to secure public deposits. Congress wanted to put national banks on a footing of equality with state banks in these states in so far as their powers to give pledges to secure public deposits were concerned.

It is impossible to conceive of any intelligible motive for distinguishing between *de jure* and *de facto* powers. By the Enabling Amendment, Congress, on the *de jure* side, subjected the national banks to the whim of the state legislatures. The greater good involved in equal competition was thought to justify this. There is no reason why the same consideration would not justify Congress, on the *de facto* side, in subjecting national banks to the decisions of the state courts. If there ever were a Congressional policy against permitting political subdivisions to obtain pledges from national banks which would result in preferences in case of insolvency, that policy was surrendered into the keeping of the several states where the banks operated.

There is no indication, unless it be in the letter of the word "authorized", that Congress was willing to bow to the will of the state legislatures but not to the will of the state courts.

Such a literal interpretation of the word "authorized" would not meet the mischief which the Enabling Amendment was designed to meet. The situation resulting in the State of New York from the decision below is a perfect example of the failure.

A decision rendered by the Court of Appeals of the State of New York after the pledges here involved were made, while it held that such a pledge was not approved by the Banking Law and should be rescinded by the Superintendent of Banks, nevertheless held that it might be retained until the deposit was repaid in full. The City of Mount Vernon, Westchester County, which deposited its funds in a state bank and had them secured by such a pledge, was able to recover its deposits in full, under the New York State doctrine, when the bank failed (*City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400, *supra*), but the City of Yonkers, Westchester County, which deposited its funds in a national bank secured by the same pledge, has not been allowed its full deposits by the courts below.

We cannot pretend that unless the decision below is reversed there are going to be a great number of newly-arising cases in New York which will exhibit this discrimination between the treatment of municipalities which have secured pledges from national banks, on the one hand, and those which have secured pledges from state banks, on the other. As respects future banking practice, there are not going to be any pledges given by state banks which might give the state banks the advantage in competing with national banks for public deposits. The Superintendent of Banks is required to visit the New York state banks twice a year and is under strict instructions from the New York Court of Appeals to rescind any pledges to secure deposits

where not contemplated by statute. (*State Bank of Commerce* v. *Stone*, 261 N. Y. 175, 187, *supra*.) As appears from the petition for *certiorari*, however, other existing controversies depend upon the decision of this one. Still more important is the general effect of the decision below upon the attitude of the fiscal officers of municipalities toward national banks as distinguished from state banks. Before the New York Court of Appeals had settled the state common law favoring the municipalities and before the United States Supreme Court settled the federal common law against the municipalities, the national and state banks in Westchester County were competing for deposits of public moneys. The City of Mount Vernon chose a state bank and took security while the City of Yonkers chose a national bank and took security. The fiscal officials of the cities of the State of New York know that the city which used the state bank was held to be preferred when the bank failed and the city which used the national bank was held to be a mere general creditor. The resultant disadvantage of the national banks was precisely what Congress was attempting to obviate by the adoption of the Enabling Amendment. The purpose of Congress can be attained by giving to the word "authorized" its broad but perfectly legitimate sense and applying it to the *de facto* security resulting from a disapproved pledge under the New York law.

POINT II.

The deposits paid out upon checks of the City prior to the date that the Comptroller took over the Bank cannot be recovered by the Receiver even if the security is unenforceable.

A mere finding of insolvency is insufficient in the absence of proof that the payments were made after an act of insolvency or in contemplation thereof with a view to prefer one creditor to another.

On Saturday, March 4, 1933, the City had on deposit with the Bank $277,230.25 in the three accounts involved in the City case (R. 165); the petitioners in the Police case had $29,283.67 in two Police Pension Fund accounts (P. R. 119) and the petitioners in the Firemen's case had $16,590.75 in the Firemen's Pension Fund account (F. R. 117). The subject matter of this point does not apply to "The Saunders Trade School Fund" account involved in No. 545 since none of the funds were withdrawn before the Comptroller took over the bank—the first act of insolvency.

On the next business day, March 6, 1933, the President proclaimed a banking holiday to and including March 9, 1933, during which "all banking transactions shall be suspended" (Proc. #2039; appendix, p. 34) which was continued indefinitely on March 9 (Proc. #2040; appendix, p. 36). Under the authority of the first proclamation the Secretary of the Treasury issued Regulation #10 permitting national banks to carry on their functions for, among other things, "the payment of usual salaries and wages," and "other similar essential purposes" (appendix, p. 38).

Thereafter, and prior to March 20, 1933, when the Comptroller appointed a Conservator (R. 166) the Bank honored checks as follows:

Payroll checks issued by the petitioner in the City case aggregating $89,226.06 (R. 166, 181).

Pension checks issued by petitioners in the Police case aggregating $566.67 (P. R. 121, 135).

Pension checks issued by petitioners in the Firemen's case aggregating $150.00 (F. R. 118).

The receiver brought these actions, among other things, to recover as preferential payments under §91 (12 U. S. C.) 50% of the money so paid out between March 6 and 20, 1933. The District Court permitted such recovery and the Circuit Court affirmed.

The only authority for the recovery of payments as preferential is §91 of Title 12 U. S. C. (R. S. §5242, printed

in full in the Appendix, p. 38), which provides so far as material here that "* * * all payments of money * * *, made after the commission of an act of insolvency, or in contemplation thereof, made * * * with a view to the preference of one creditor to another, * * *, shall be utterly null and void; * * *".

The foregoing statute has often been construed by this and other courts to require proof of payment "after the commission of an act of insolvency, or in contemplation thereof" and "with a view to the preference of one creditor to another." (*McDonald* v. *Chemical National Bank*, 174 U. S. 610, *supra*; *Earle* v. *Carson*, 188 U. S. 42, 1903; *Pearson* v. *Durell*, 77 F. (2d), 465, C. C. A.—6th Cir. 1935; *Rucker* v. *Kokrda*, 68 F. (2d), 73, C. C. A.—10th Cir., 1933).

We believe that the courts below were led into error by failing to note that the only payments which may be set aside are those made after the commission of an *act* of insolvency, or in contemplation of an *act* of insolvency. In ordinary parlance, national banks are deemed to be solvent until there has been the commission of an act of insolvency. Thus, in judicial and colloquial language we find the words "date of insolvency" used to mean "date of commission of an act of insolvency" and the words "contemplation of insolvency" used to mean "contemplation of an act of insolvency". But the fact remains that no transaction can be set aside under Section 91 unless it took place after the commission of an act of insolvency, or in contemplation of an act of insolvency, and unless made with a view to prevent the application of the bank's assets in the manner prescribed by the act, or with a view to the preference of one creditor to another.

In *McDonald* v. *Chemical National Bank*, 174 U. S. 610, *supra*, it appeared that the bank was actually insolvent and that its insolvency must have been known to its officers. Yet this Court held that the statute was not satisfied, saying (p. 618):

> "* * * It is matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided. * * *"

The entire opinion of the Circuit Court of Appeals on the subject is as follows (R. 233-34):

> "* * * The Bank never opened for regular business after March 4, 1933. No attempt was made by the appellants to show any change in the Bank's condition after March 4, 1933. We hold that the facts indicated that the Bank would not be able to pay its depositors in due course and the trial court could properly draw the inference that the payments were in violation of 12 U. S. C. A. §91." Citing cases.

It is obvious from the court's language that it felt that if it could be ascertained from the record that the Bank was unable to pay its debts as they matured on the date of the institution of the Presidential bank holiday, then all payments made by the Bank thereafter could be set aside. As held in the *McDonald* case, *supra*, even such proof would be insufficient to warrant recovery of payments. The proof would have to be supplemented by evidence that those in charge of the Bank had committed an act of insolvency or contemplated such an act and made the payments with a view to prevent the application of the assets in the manner

prescribed by the act, or a view to the preference of one creditor to another. Nothing of the sort appeared in the evidence. There is no evidence of any act of insolvency or that those in charge of the Bank contemplated anything of the sort. The payments made were payments made in the ordinary course of business, as permitted by the Presidential Proclamation.

In other cases the claim has been made that the restriction of the business of all of the banks in the United States pursuant to the Presidential Proclamation amounted to an act of insolvency for such of those as thereafter failed to reopen. While neither of the courts below took this position we cite the following decisions which demonstrate its invalidity: *Kullman & Co.* v. *Woolley*, 83 F. (2d) 129 (*supra*); *Richman* v. *First Methodist Episcopal Church*, 76 F. (2d) 344 (*supra*).

The determination of the Circuit Court in affirming the judgments below is squarely opposed to the decision of this Court in the *McDonald* case and should be reversed insofar as the judgments include the payments made prior to the date of the first act of insolvency, the date on which the Conservator was appointed.

Conclusion.

The judgments should be reversed and the complaints dismissed.

Respectfully submitted,

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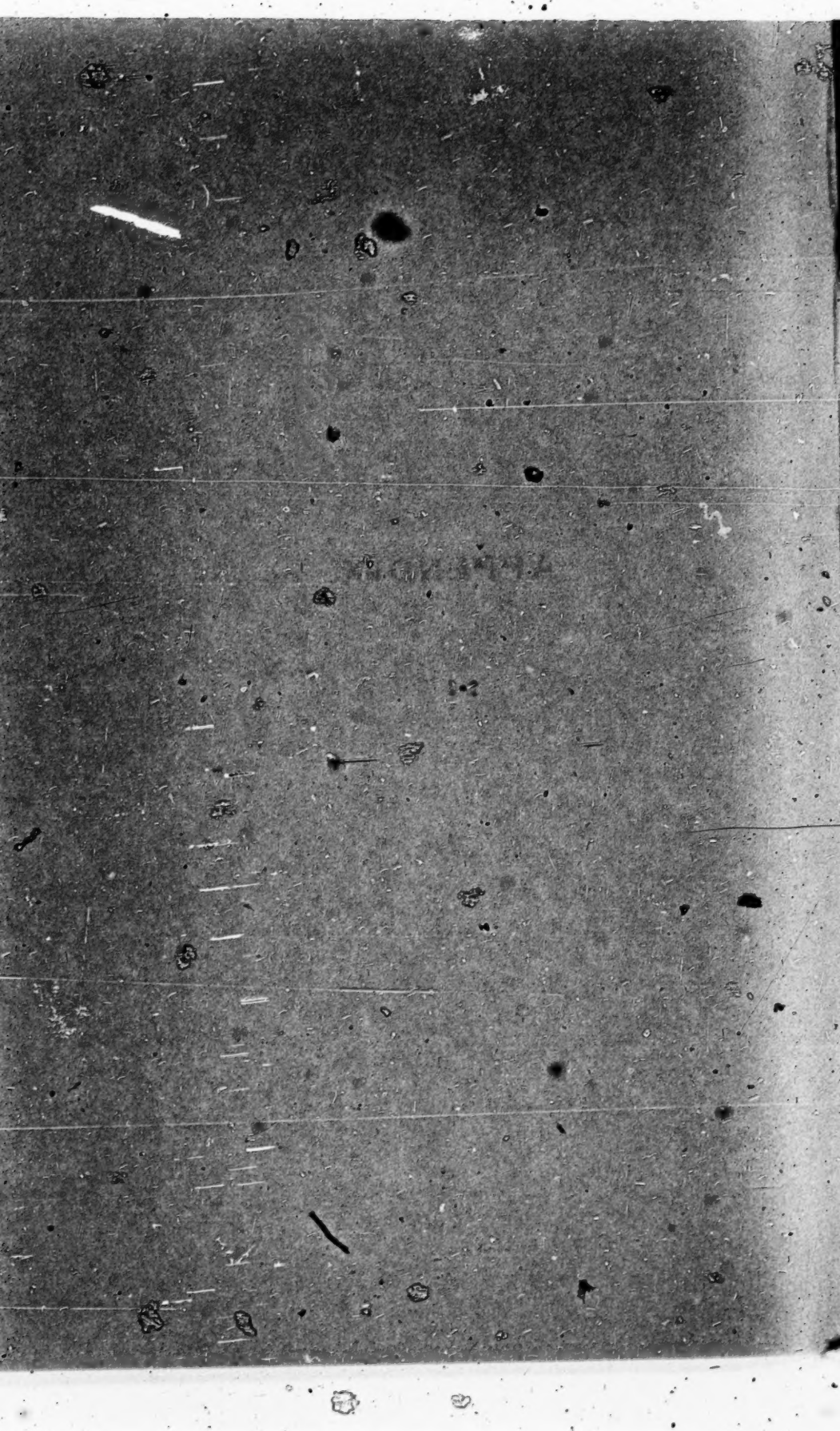
APPENDIX.



Appendix.

Proclamation of President of March 6, 1933, declaring a bank holiday.

PROCLAMATION No. 2039.

"WHEREAS there have been heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding; and

"WHEREAS continuous and increasingly extensive speculative activity abroad in foreign exchange has resulted in severe drains on the Nation's stocks of gold; and

"WHEREAS these conditions have created a national emergency; and

"WHEREAS it is in the best interests of all bank depositors that a period of respite be provided with a view to preventing further hoarding of coin, bullion or currency or speculation in foreign exchange and permitting the application of appropriate measures to protect the interests of our people; and

"WHEREAS it is provided in Section 5 (b) of the Act of October 6, 1917, (40 Stat. L. 411) as amended, 'That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency * * *' and

"WHEREAS it is provided in Section 16 of the said Act 'that whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act, shall, upon conviction, be fined not more than $10,000, or, if a natural per-

son, imprisonment for not more than ten years, or both; . . . ;

"Now, THEREFORE, I, Franklin D. Roosevelt, President of the United States of America, in view of such national emergency and by virtue of the authority vested in me by said Act and in order to prevent the export, hoarding, or earmarking of gold or silver coin or bullion or currency, do hereby proclaim, order, direct and declare that from Monday, the sixth day of March, to Thursday, the ninth day of March, Nineteen Hundred and Thirty Three, both dates inclusive, there shall be maintained and observed by all banking institutions and all branches thereof located in the United States of America, including the territories and insular possessions, a bank holiday, and that during said period all banking transactions shall be suspended. During such holiday, excepting as hereinafter provided, no such banking institution or branch shall pay out, export, earmark, or permit the withdrawal or transfer in any manner or by any device whatsoever, of any gold or silver coin or bullion or currency or take any other action which might facilitate the hoarding thereof; nor shall any such banking institution or branch pay out deposits, make loans or discounts, deal in foreign exchange, transfer credits from the United States to any place abroad, or transact any other banking business whatsoever.

"During such holiday, the Secretary of the Treasury, with the approval of the President and under such regulations as he may prescribe, is authorized and empowered (a) to permit any or all of such banking institutions to perform any or all of the usual banking functions, (b) to direct, require or permit the issuance of clearing house certificates or other evidences of claims against assets of banking institutions, and (c) to authorize and direct the creation in such banking institutions of special trust accounts for the receipt of new deposits which shall be subject to withdrawal on demand without any restriction or limitation and shall be

kept separately in cash or on deposit in Federal Reserve Banks or invested in obligations of the United States.

"As used in this order the term 'banking institutions' shall include all Federal Reserve banks, national banking associations, banks, trust companies, savings banks, building and loan associations, credit unions, or other corporations, partnerships, associations or persons engaged in the business of receiving deposits, making loans, discounting business paper, or transacting any other form of banking business."

Proclamation of President of March 9, 1933, continuing Bank Holiday.

PROCLAMATION No. 2040.

"WHEREAS, on March 6, 1933, I, FRANKLIN D. ROOSEVELT, President of the United States of America, by Proclamation declared the existence of a national emergency and proclaimed a bank holiday extending from Monday the 6th day of March to Thursday the 9th day of March, 1933, both dates inclusive, in order to prevent the export, hoarding or earmarking of gold or silver coin, bullion or currency, or speculation in foreign exchange; and

"WHEREAS, under the Act of March 9, 1933, all Proclamations heretofore or hereafter issued by the President pursuant to the authority conferred by section 5 (b) of the Act of October 6, 1917, as amended, are approved and confirmed; and

"WHEREAS, said national emergency still continues, and it is necessary to take further measures extending beyond March 9, 1933, in order to accomplish such purposes:

"NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, in view of such continuing national emergency and by virtue of the authority

vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. L., 411) as amended by the Act of March 9, 1933, do hereby proclaim, order, direct and declare that all the terms and provisions of said Proclamation of March 6, 1933, and the regulations and orders issued thereunder are hereby continued in full force and effect until further proclamation by the President."

TITLE 12 U. S. C. §90.

§90. Depositaries of Public Moneys and Financial Agents of Government.

"All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided,* That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided,* That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." (R. S. 5153).

TITLE 12 U. S. C. §91.

"§91. TRANSFERS BY BANK AND OTHER ACTS IN CONTEMPLATION OF INSOLVENCY.

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate; or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. (R. S., §5242.)"

REGULATION NO. 10 OF SECRETARY OF TREASURY.

"Regulation No. 10 (March 7, 1933, as amended on March 10 by addition of matter in italics). 'Any national or State banking institution may exercise its usual banking functions to such extent as its situation shall permit and as shall be absolutely necessary to meet the needs of its

community for food, medicine, other necessities of life, for the relief of distress, *for the payment of usual salaries and wages,* for necessary current expenses and for the purpose of maintaining employment, and for other similar essential purposes. Banking institutions may carry out such transactions as may be necessary to aid banking institutions in other communities *to meet the necessities set forth above.* Provided, however, that (1) every precaution shall be taken to prevent hoarding or the unnecessary withdrawal of currency; (2) no State banking institution shall engage in any transaction under this regulation which is in violation of State or Federal law or of any regulation issued thereunder; (3) no national banking association shall engage in any transaction under this Section which is in violation of any Federal law or of any order or regulation issued by the Comptroller of the Currency; and (4) no gold or gold certificates shall be paid out. Each banking institution and its directors and officers will be held strictly accountable, for the faithful performance, with the spirit and purpose, as well as the letter of this regulation. *Federal reserve banks* may carry on such functions as may be necessary to facilitate transactions authorized by this regulation.' ''

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 542.

THE CITY OF YONKERS, *Petitioner,*

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

No. 543.

JOHN J. CONDON, Mayor, GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller and RAYMOND J. WHITNEY, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, *Petitioners,*

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

No. 544.

JOHN J. CONDON, Mayor, GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller and RAYMOND J. WHITNEY, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, *Petitioners,*

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

No. 545.

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund", *Petitioner,*

against

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York.

REPLY BRIEF FOR PETITIONERS.

E. J. DIMOCK,
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Of Counsel.

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No. 545.

REPLY BRIEF FOR PETITIONERS.

The brief of the respondent, so far as bulk is concerned, is principally devoted to the establishment of propositions, the correctness of which was conceded by the petitioners. To that extent it seems to be directed to such doubts as may exist in the mind of the Court as to the propriety of our concessions and to that extent we need give it no further notice.

Reply to Respondent's Point I (A) Headed, "The Pledge by the Bank to Secure the City's Deposits Was *Ultra Vires*, Illegal and Void and Payments Erroneously Made to Redeem the Security May Be Recovered."

Under this head counsel discuss only the law in the federal courts. As our position with respect to the effect of the *ultra vires* pledge is based upon the doctrine of the New York courts, we need not consider the respondent's argument.

Reply to Respondent's Point I (B) Headed, "The Policy and Provisions of the National Bank Act Control the Consequences of the Pledge and Not the Common Law of New York."

Counsel for the respondent first argue (Br., p. 12) that the subject of the consequences of an *ultra vires* pledge is left open by the National Bank Act and that a special federal common law should govern those consequences. Counsel for the respondent say that this absence of any provision as to the effect or consequences of an unauthorized pledge does not permit the law of the State of New York to "complement" the Enabling Amendment.

This claim of the respondent is based upon the hypothesis that when Congress enacted the National Bank Act

it federalized the entire law of banking so far as national banks were concerned just as Congress when it undertook to regulate interstate commerce or navigation closed those fields to the application of state law.

This view loses sight of the fundamental characteristic of the national banking system that the national banks in their commercial transactions are governed by the same commercial laws as the other corporations and individuals with whom or in competition with whom they deal. As was said by Mr. Justice White in *McClellan* v. *Chipman*, 164 U. S. 347, 357, decided in 1896:

> "These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States."

It is true that so far as the internal government of the national banks is concerned, the federal power is not only paramount, but exclusive. With respect, however, to the banking business carried on by the national banks with third parties, Congress has advisedly left the field practically unoccupied for the application of the state law, whether state statute law or state common law. It has never been held that when the court applied the *lex loci contractus* to the solution of a question of the law of —say—commercial paper arising between a national bank and an individual, the state law was unlawfully "complementing" the federal law. On the contrary, it is well-settled

that where the state commercial law has created a lien upon the assets of a national bank in favor of a depositor, and the bank thereafter fails, that lien is unaffected by any federal law with respect to the winding up of national banks such as the provision for ratable dividends (§50 of the National Bank Act, R. S. §5236, U. S. C. Title 12, §194). For example, Mr. Justice Brandeis said in *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 568 (1934):

> "Sections 50 and 52 do not prohibit liens given prior to insolvency and not in contemplation thereof, whether they arise from express agreements, or are implied from the nature of the dealings between parties, or arise by operation of law. *Scott* v. *Armstrong*, 146 U. S. 499, 510; *Earle* v. *Pennsylvania*, 178 U. S. 449, 454. The lien here asserted arises out of an agreement executed at a time when there was no question of insolvency; nor is it restricted in its operation to the event of insolvency. It may be exercised by execution or otherwise whenever the bank refuses to pay. * * * The case at bar is unlike *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, relied upon by the receiver, where a New York statute dealing with the administration of insolvent banks provided that in the event of insolvency the deposits of a savings bank would be entitled to a preference."

See also the language of Mr. Chief Justice Fuller in *Scott* v. *Armstrong*, 146 U. S. 499, 510 (1892):

> "We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to an-

> other, is forbidden; but liens, equities or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency."

See also *Willing* v. *Binenstock*, 302 U. S. 272, 276 (1937) and *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131, 146 (1899).

It is quite true, as pointed out by counsel for the respondent on pages 14 and 15 of their brief, that *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), held only that there was no federal *general* common law and that *Hinderlider* v. *La Plata Co.*, 304 U. S. 92 (1938), held that there was a federal common law as to the apportionment of the water of an interstate stream between two states. In spite of a few compressed statements in our brief where we assert that there is no federal common law instead of stating, as we usually did, that there was no federal common law of banking, we do not contend that questions such as those concerning the boundaries between states must be decided under the law of the states involved, or that in such cases as *Board of County Commissioners* v. *U. S.*, No. 14, October Term, 1939, 84 L. ed. 233, which involved an Indian's treaty rights, this Court must apply the law of the state where the cause of action arises. Our position would not be impaired even if it should be held that the method of liquidation of national banks was a matter akin to the internal management of the banks so that a federal common law should fill any

gaps that might exist in the federal statute prescribing the method of liquidation of national banks. The question here, however, is not a question of the method of the liquidation of a national bank but a question of the substantive rights of a depositor which existed prior to and irrespective of the liquidation of the bank. Congress, instead of federalizing that field, has deliberately left it to the state law so that its creatures, the national banks, may compete upon an equal footing with the state banks (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564, *supra*).

The distinction between pre-existing rights and those arising on insolvency was clearly pointed out in *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216 (1935), where this Court refused to give effect to a statute of Indiana (Indiana Acts, 1928, c. 164, §13(3)) which provides that where an agent collecting bank "shall fail or be closed for business" after having received the proceeds of an item entrusted to it for collection, "the assets of such agent collecting bank * * * shall be impressed with a trust in favor of the owner or owners of such item or items for the amount of such proceeds." Mr. Justice Cardozo there said for this Court at page 225:

> "What is regulated in that section is not the relation between a bank and its correspondents during the normal course of business. What is regulated is the relation and the remedy when insolvency has set in and business is suspended. Then for the first time a trust comes into being through the action of the statute * * *. A trust so created, to arise upon insolvency, is a preference under another name."

The distinction was also pointed out by Mr. Justice Brandeis in the portion of the opinion in *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 568, quoted at page 4, *supra*.

The right of the depositor who has received an *ultra vires* pledge to retain the pledged assets until his deposit is paid is an incident of the relation between the bank and the depositor during the normal course of business. It is in substance a present interest in the specific assets pledged. In this it differs fundamentally from the right created by the Indiana statute which was at most a floating charge which fixes upon all of the assets of the bank at the instant of insolvency.

Counsel for the respondent make what is evidently an alternative assertion. They say that, instead of there being a gap where the statute needs complementing, the expressed policy and provisions of the National Bank Act compelled the conclusion of the federal courts that property which is the subject of an *ultra vires* pledge may be recovered without repaying the deposits. The brief goes no farther than assertion, however. There is no attempt to point out any provision of the National Bank Act which states that policy and no decision of this Court is cited which holds that the National Bank Act exhibits that policy. Counsel fail in their attempt to show that *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245 (1934) so holds. (See our principal brief, p. 19.)

The National Bank Act does not even say that national banks may not pledge their assets to secure deposits. As stated by Mr. Justice Black in *McNair* v. *Knott*, 302 U. S. 369, 371 (1937):

> "For many years Comptrollers of the Currency assumed that National banks had power to give security for public deposits and approved the practice of the banks in pledging such security."

It was not until the decision of City of Marion v. Sneeden, 291 U. S. 262 in 1934, that it was determined that

such a pledge would be *ultra vires*. This state of affairs is to be contrasted with the express limitation presented in *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209 (1935), cited on page 20 of the respondent's brief. There this Court was dealing with Revised Statutes, Section 5136, paragraph 7, which provided that the business of buying and selling investment securities should thereafter "be limited to buying and selling without recourse" marketable obligations. This Court, in holding that a bank's agreement to repurchase securities in violation of this expressed limitation created no rights in the purchaser, distinguished cases of mere *ultra vires*, like the case at bar, saying (p. 214):

> "The phrase is broader than a mere limitation upon the power to contract, although embracing that limitation. It is a prohibition of liability, whatever its form, by way of recourse, 'growing out of the transaction of the business.'"

It seems to us that counsel for the respondent surrender the case when they recognize on page 24 "that as a going concern the bank would have been required to make a refund of the amount of the deposit incident to obtaining the relief sought, namely, the return of the collateral." That means that if the bank, while clearly solvent, had sought to replevy the collateral, alleging payment of the deposit, and the depositor had defended upon the ground that the alleged payment had been on a forged check and that therefore the depositor was still entitled to payment, the defense against the recovery of the collateral would have been good in law. If the depositor thus had a right to hold the collateral until his deposit was paid, irrespective of insolvency, then there was an existing property interest in the collateral which would be protected on insolvency under

such cases as *Scott* v. *Armstrong*, 146 U. S. 499, 510, *supra*, *Willing* v. *Binenstock*, 302 U. S. 272, 276, *supra*, and *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 568, *supra*.

Counsel argue (p. 24) that in some way the security "is removed" upon insolvency and that the depositor is no longer a secured creditor and merely retains the status of a general creditor. Nothing is better settled than the proposition that insolvency does not remove existing liens.

Again, in this Point, counsel for the respondent can do no more than to assert (p. 32) "that no lien could possibly arise from an invalid, illegal pledge." Characterizing the pledge as invalid and illegal is of no help in the solution of the problem. The fact remains that whatever adjectives we apply to the pledge, the collateral cannot be recovered under the law of the State of New York without repayment of the deposit. The law of New York applies, for Congress has neither federalized the whole field of national banking nor adopted any rule to cover this part of it.

Reply to Respondent's Point I (C) Headed, "The New York Law as to the Consequences of the Pledge Was Not Incorporated in the National Bank Act by Reference."

The respondent's answer is little more than a reassertion of the assertion by the Circuit Court of Appeals that a pledge which is "*ultra vires*" cannot be said to be "authorized." We think that it can and that we demonstrated on pages 24-28 of our principal brief that (especially if we grant that the original National Bank Act exhibits a policy against giving effect to unauthorized pledges), the Enabling Amendment must be held to treat as authorized *ultra vires* pledges which are effective under state decisions.

Counsel for the respondent say that the decisions of this Court give no effect to such *ultra vires* pledges by national

banks. But it is the very diversity between the federal common law and the New York common law on this point that raises the question. Counsel say that if the Enabling Amendment is construed so as to validate for national banks *ultra vires* pledges which are valid for state banks under state law, that will clash with the policy of the National Bank Act against ratable distribution on insolvency. That begs the question. If the National Bank Act says that such *ultra vires* pledges are effective, then that is the policy of the National Bank Act. We have no place in which to look for the policy of a statute except in the statute itself. One might as well say that the adoption by the Enabling Amendment of the state law as to what pledges were *intra vires* was void as out of harmony with the policy of another part of the Act in favor of ratable distribution in insolvency.

The fact cited that in no case has it been thus far held that the Enabling Amendment adopted the state law as to the effect of an *ultra vires* transaction is not surprising in view of the circumstance that in none of the cases thus far decided did the particular state law concerned give effect to *ultra vires* pledges of state banks as does the law of the State of New York.

Reply to Respondent's Point I (D) Headed, "The New York Decisions Are to the Effect That New York Courts Should Follow the Decisions of the Supreme Court in the Interpretation and Construction of Federal Statutes, and Federal Policies Thereunder Implied Including the National Banking Statutes and Decisions Construing the Same."

While the New York decisions are to the effect that the New York courts should follow the decisions of the Supreme Court in the interpretation and construction of

federal statutes, the New York courts have never held that they should follow the decisions of the federal courts as to the effect of *ultra vires* acts committed in the State of New York where no question of the construction of a statute is involved. This very distinction is brought out by the cases cited by respondent. Of the five decisions cited, the following involve the construction of federal statutes and may therefore be disregarded:

Hintermister v. *First National Bank*, 64 N. Y. 212 (1876);

Duncomb, et al. v. *N. Y. H. & N. R. R. Co., et al.*, 84 N. Y. 190 (1881);

Longley v. *Coons*, 244 App. Div. 391 (1935);

Buffalo German Ins. Co. v. *Third Nat. Bank*, 29 App. Div. 137 (1898).

One case cited, however, did involve the common law effect of an *ultra vires* act performed by a national bank in the State of New York. That case was *Appleton* v. *Citizens' Nat. Bank*, 190 N. Y. 417 (1908). Counsel for the respondent cite the following sentence from page 420 of the opinion:

> "We may further assume that in transactions by national banks we should adopt the law of *ultra vires* as it prevails in the Federal courts, and not the local law on the subject."

If counsel had read further they would have found that this assumption was for the purpose of discussion only and that the case was disposed of without deciding the point. Judge Cullen, after the quoted sentence, went on to say (p. 420):

"Yet the defendant, in our opinion, became plainly liable for the amount which it received under the *ultra vires* contract. The law which obtains in this state and in several other jurisdictions is that where one party has received the full benefit of an *ultra vires* contract it cannot plead the invalidity of the contract to defeat an action upon it by the other party (*Bath Gas Light Co.* v. *Claffy*, 151 N. Y. 24). A contrary rule obtains in the Supreme Court of the United States. * * * In a great many cases the difference between the law prevailing in the Federal courts and that in our own would lead to great difference in results. In this case, however, as the plaintiff disclaims any right to recover beyond the amount actually received by the defendant, the result is exactly the same whether we adopt one rule or the other. Whatever the difference of view there may be as to the effect of *ultra vires* on corporate contracts, in no jurisdiction can a party retain what it has received under such a contract and refuse to perform the contract."

Reply to Respondent's Point II (A) Headed, "The Payments by the Bank to the Petitioners Between March 8 and March 18, 1933, Were in Violation of U. S. C., Title 12, Sec. 91."

U. S. C., title 12, §91, provides that payments "made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, shall be utterly null and void."

McDonald v. *Chemical National Bank*, 174 U. S. 610 (1899), treated more fully at pp. 31-32 of our principal brief, holds that this section means exactly what it says and that even though the officers of a bank with full knowl-

edge of its insolvency but not in contemplation of an act of insolvency pay checks presented in the due course of business, that is not enough to make the payments void.

We say that all that the courts below held that the plaintiff had shown here was that the bank was insolvent at the time of the promulgation of the Presidential Proclamation. Hence, no more than in the *McDonald* case, was there any proof of contemplation of an act of insolvency or intention to prefer. Counsel for the respondent charge us with ignoring the decision of this Court in *Mechanics Co.* v. *Culhane*, 299 U. S. 51 (1936), which is evidently cited for a rule that payments not in the usual course of business made during insolvency are recoverable.

In the first place, the rule in the *Culhane* case requires much more proof than mere insolvency and payments out of the usual course of business, and in the second place, the payments here involved were made in the usual course.

In *Mechanics Co.* v. *Culhane*, 299 U. S. 51, *supra*, one Ekstrom, president and manager of the Mechanics Co., and a director of the Manufacturers Bank, attended a meeting with the national bank examiner, at which the examiner stated that there would be a run on the local banks and that the Manufacturers Bank could not stand a run of one business day, and at which the directors authorized the examiner to negotiate to have the bank's affairs taken over by some other bank. Shortly after leaving that meeting, he drew a check of the Mechanics Co. on the bank for over two-thirds of the deposit in the Manufacturers Bank and deposited it in another bank for collection. The next day the Manufacturers Bank closed its doors after payment of the check and the receiver brought an action for the recovery of the amount so paid out.

The depositor claimed that the facts above stated did not constitute proof of a payment in contemplation of an act of insolvency made with a view to the preference of one creditor to another. This Court, through Mr. Justice Brandeis, answered that the situation did not differ from a withdrawal by Ekstrom of his own deposit, saying (pp. 56-57):

> "We have no occasion to decide whether a stranger would be liable as for a preference, if, without suggestion from any officer or employee of the bank, he withdrew his deposit because of rumor or suspicion of insolvency. It is true that ordinarily a payment made by a bank to a depositor in the usual course of business is not recoverable, even though the bank was then clearly insolvent: Compare *McDonald* v. *Chemical National Bank*, 174 U. S. 610. But the payment here in question was not made in the usual course of business; and the Company was not a stranger. Its president and manager was a director of the bank; as such acquired in confidence knowledge of its perilous condition; and, in violation of his statutory duty as director, used that knowledge for the purpose of preferring his Company. If the deposit withdrawn had been in Ekstrom's own name, he would, obviously, have been obliged to return it. The Company is in no better position."

The rule there laid down is that where a depositor knows of the insolvency of the bank by virtue of his official connection therewith and transfers the major part of his deposit from the insolvent bank to a safer one, the payment will be deemed to be with a view to his preference over other creditors. There is no basis for deducing from the *Culhane* case a naked rule that payments made by an insolvent bank not in the due course of business are recov-

erable. Many other elements are necessary before that result can be reached.

But even the element of payment outside of the usual course of business is absent in the case at bar. "Payment outside of the usual course of business" is not a mere incantation. It means something in connection with the problem presented. It is a payment which by its size and proportion to the total deposit or perhaps by its character as a mere shift from one bank to another, or perhaps because of being made outside of the usual banking hours, bears a badge of a general attempt to obtain a preference.

Nothing of that kind characterizes the payment made pursuant to the general restrictions which were placed upon all banking by the Presidential Proclamation. Payments made in the case at bar before the appointment of the conservator were made in the usual course of business in so far as there was any banking business in the United States. There was nothing to differentiate any one of them from the millions of other transactions going on all over the country at the same time. The badge of guilt was absent.

Counsel for the respondent urge the practical construction of the statute by the Comptroller of the Currency in the light of the Presidential Proclamation as fixing the date of the act of insolvency as the last date on which the bank did an unrestricted banking business. It is said in the brief that this date was chosen by the Comptroller in all cases where a conservator was appointed and the bank ultimately was liquidated.

There seems to be a hint that the Comptroller was given some power to make such a determination by the "Bank Conservation Act" of March 9, 1933, U. S. C., Title 12, Section 201. That section is merely the short title of the act and a search of the rest of it fails to disclose any such

grant of power. Even if it be true that in every such case the Comptroller has insisted upon recovering from the depositors all payments made pursuant to the Presidential Proclamation after its promulgation, the Comptroller could do so only by force of law. If upon submission of the question to this Court it appears that he acted without the support of the law in those other cases, that is no reason why the law should support him in this case. There is no reason why his construction of the statute should be given any more weight here than his long continued construction of the statute pointed out in *McNair* v. *Knott*, 302 U. S. 369, *supra*, was given in City of Marion v. Sneeden, 291 U. S. 262 (1934).

In a case where, as here, there was no violation of Section 91 of title 12, U. S. C., prior to the appointment of the conservator, the appointment of the conservator (which is expressly made the equivalent of the appointment of a receiver by Section 203), is the first act of insolvency. Thus the date of the appointment of the conservator is the critical date for distinguishing between prior payments which cannot be recovered and subsequent payments which can be.

Answer to Respondent's Point II (B) Headed, "The Payments Made by the Bank to the Petitioners Between March 8 and March 18, 1933 Were Not Authorized Under the President's Proclamations and the Regulations Issued Thereunder."

Under this head the respondent makes the point that the regulation of the Secretary of the Treasury (Res. Br., p. 49) permitted a bank to exercise its usual banking functions only "to such extent *as its situation shall permit* and * * * for the payment of usual salaries and wages," etc.*

* The indications by italics of the amendments of March 10, 1933, on the copy on p. 47 of the Respondents' brief are correct. The indications on the copy on p. 39 of our original brief are incorrect.

It is urged that this was intended to reverse the normal rule and to place upon the banks and all persons dealing with them the burden of determining whether the bank was insolvent at the time of the payment of the salaries and wages and to render void and recoverable all such payments if the bank was insolvent.

Here again, counsel omit any attempt to enforce their construction with reason. No explanation is offered as to why the Secretary of the Treasury should have wished to put this clog upon the making of such payments "as shall be absolutely necessary to meet the needs of its community for food, medicine, other necessities of life, for the relief of distressed, for the payment of usual salaries and wages, for necessary current expenditures for the purpose of maintaining employment, and for other similar essential purposes."

It is our belief that the purpose of the qualifying words "to such extent as the situation shall permit" was to make it clear that by allowing payments of the limited permitted class the Secretary did not intend to permit payments "after the commission of an act of insolvency * * * made * * * with a view to the preference of one creditor to another, etc." and thus void under Section 91. If the Secretary had meant to make mere insolvency the test, he would have certainly used clearer language.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 542.

THE CITY OF YONKERS, *Petitioner*,

v.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, *Respondent*.

No. 543.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, *Petitioners*,

v.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, *Respondent*.

No. 544.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, *Petitioners*,

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No. 545.

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund," *Petitioner*,

v.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York, *Respondent*.

BRIEF OF RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 542.

THE CITY OF YONKERS, *Petitioner*,

v.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, *Respondent*.

No. 543.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, *Petitioners*,

v.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, *Respondent*.

No. 544.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, *Petitioners*,

v.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, *Respondent*.

No. 545.

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund," *Petitioner*,

v.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York, *Respondent*.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASES.

These are suits brought by the receiver (respondent herein) of the First National Bank and Trust Company

of Yonkers, New York, to recover from petitioners, as depositors in the bank, sums of money alleged by the receiver to have been illegally paid to petitioners while the bank was closed by virtue of the Banking Holiday of 1933 and subsequent thereto while the bank was in conservatorship. The payments were made in reliance upon the erroneous assumption that a pledge of assets given by the bank to secure repayment of said deposits was valid. The receiver contended that the payments thus erroneously made could be recovered to the extent that such payments exceeded the *pro rata* distribution made to the other depositors.

The judgments of the trial court, directing repayment to the receiver of the principal amounts of the illegal payments, plus interest, (R. 197 in No. 542, R. 142 in No. 543, R. 138 in No. 554, R. 103 in No. 545) were affirmed by the Circuit Court of Appeals (R. 235 in No. 542, R. 182 in No. 543, R. 177 in No. 554, R. 138 in No. 545).

The bank last did an unrestricted banking business on March 3, 1933 (R. 31-33).* It did not reopen for business on March 4, 1933, inasmuch as the Governor of the State of New York had proclaimed a State Banking Holiday taking effect on that date (R. 85). March 5th was Sunday, and the bank thereafter remained closed by virtue of the President's Proclamations declaring a nation wide Banking Holiday effective March 6, 1933. On March 9, 1933, Congress by enactment ratified the President's proclamation (U. S. C., title 12, sec. 95b). **The bank never thereafter reopened** (R. 33). It failed to obtain a license to reopen on March 15, 1933, the date on which sound banks in Yonkers, and other cities of that class, were licensed to resume unrestricted business. A conservator for the bank was appointed on March 20, 1933, (R. 81) and it remained in conservatorship until January 23, 1934, on which date a receiver was appointed, (R. 83). The subsequent liquidation of the bank was upon the premise that the rights of all depositors, creditors and stockholders became fixed as of the close of business on March 3, 1933; and in consequence

*All record references are to case No. 542, except where otherwise indicated.

thereof interest on deposits, claims against the receivership, and the allowance of offsets, have been determined and resolved as of that date (R. 49). Two dividends have been paid to the bank's general creditors,—40 per cent on December 16, 1933, and 10 per cent on November 3, 1937, (R. 30).

On March 3, 1933, the petitioner in No. 542—The City of Yonkers—had deposit balances in the bank totaling $277,230.25, (R. 94, 141, 142, 164, 165, in No. 542). The petitioners in No. 543—The Board of Trustees of the Police Pension Fund—had deposit balances in the bank totaling $29,283.67, (R. 119 in No. 543). The petitioners in No. 544—The Board of Trustees of the Firemen's Pension Fund—had deposit balances in the bank totaling $16,590.75, (R. 117 in No. 544). The petitioner in No. 545—The City of Yonkers as Trustee for "The Saunders Trade School Fund"—had deposit balances totaling $4,971.38, (R. 77 in No. 545). Prior to the bank's suspension it had illegally attempted to pledge its assets—of a par value of $535,000.00—as security for all of said deposits as constituting public money of the City of Yonkers. (The illegality of the pledge is, in effect, conceded by petitioners; see discussion herein, *infra*, p. 7). These assets remained in the bank's safe deposit boxes under the dual control of the bank and the City until after the conservator was appointed. The City never had exclusive control of the assets (R. 74). After he assumed charge of the bank's affairs the conservator, acting illegally, but on the assumption the City was a secured depositor, (1) recognized rights of the City in the bank's assets contained in said safe deposit boxes, (2) paid the deposit balances of the City in full, except the sum of $126.49, and (3) failed to recoup from the sums due the City on a pro rata basis the illegal payments made by the bank between March 8, 1933 and the date of the conservator's appointment.

Petitioners, in their statement of the case, say (Pet. Brief, p. 8):

> "If the law as laid down by the New York State courts governed the consequences of the pledge either

by its own force or by adoption by the federal statute, the repayment of the deposits and the return of the pledged securities was in strict accordance with the rights of the parties so that the plaintiff could not succeed.

"If, however, the law as stated in the federal courts were applicable to the consequences of the pledge, the Conservator had overpaid the City when he paid out the deposits in full and recovered the pledged securities."

The foregoing statement constitutes the basis of discussion in "Point I" of petitioners' argument (Pet. Brief, pp. 11-15; 17-29).

In their statement of the case petitioners also say (Pet. Brief, p. 8):

> "Even if the repayment of the deposits had not been justified by the existence of the pledge, the Receiver could not recover without proof that the payments by the Bank were made after the commission of an act of insolvency, or in contemplation of an act of insolvency, and proof that the payments were made with the intent to prefer the City over other creditors."

The foregoing statement constitutes the basis of discussion in petitioners' "Point II" of their argument (Pet. Brief, pp. 16-17; 29-33).

As hereinafter pointed out (*infra* p. 7) petitioners concede that the pledge of assets to secure repayment of the deposits was *ultra vires*. Consequently, with this factor eliminated from the issues pending in this Court, the questions now presented are correctly set forth on page 2 of petitioners' brief:

> "1. Whether the effect of an *ultra vires* pledge made by a national bank in New York to secure a deposit of public funds is determined (a) by the rule in the federal courts that the bank need not repay the deposit in order to obtain the return of the pledged securities or (b) by the rule in the New York courts that the bank must repay the deposit in order to obtain this return.

"2. Whether payments made by a bank to a depositor in accordance with the Presidential Proclamation after the banking holiday of March 6, 1933, but before the bank was taken over by the Comptroller of the Currency, can be recovered as preferential without any proof that the payments were made after the commission of an act of insolvency or in contemplation of an act of insolvency, or proof that the payments were made with the intent of creating a preference."

SUMMARY OF ARGUMENT.

I.

The petitioners were not entitled to hold the security until their deposits were repaid in full, inasmuch as the pledge of assets constituting such security was ultra vires, illegal and void. Therefore, the receiver of the National Bank was entitled to recover the payments made to the petitioners in reliance upon the erroneous assumption that the pledge of assets was valid.

(A). The pledge by the bank to secure the petitioners' deposits was ultra vires, illegal and void and payments erroneously made to redeem the security may be recovered.

(B). The policy and provisions of the National Bank Act control the consequences of the pledge, and not the common law of New York.

(C). The New York law as to the consequences of the pledge was not incorporated in the National Bank Act by reference.

(D). The New York decisions are to the effect that the New York courts should follow the decisions of the Supreme Court of the United States in the interpretation and construction of Federal statutes and Federal policies thereunder implied including the national banking statutes and decisions construing the same.

II.

All payments made by the bank to the petitioners during the banking holiday and prior to the appointment of the conservator were illegal and were recoverable by the receiver because they constituted preferential payments prohibited by the National Banking laws and further because said payments were not authorized under the President's proclamations and the regulations issued thereunder.

(A). The payments by the bank to the petitioners between March 8th and March 18, 1933, were in violation of Section 5242 of the Revised Statutes (U. S. C. title 12, sec. 91).

(B). The payments made by the bank to the petitioners between March 8th and March 18, 1933, were not authorized under the President's Proclamations and the regulations issued thereunder.

ARGUMENT.

I.

REPLY TO "POINT I" OF PETITIONERS' ARGUMENT.

Preliminary Statement.

Petitioners, in their brief, have, for the purpose of simplicity and convenience in developing the argument under their "Point I," treated the questions and issues concerning the City's deposits as controlling the situation involving the three other deposits. We shall follow the same method in the discussion constituting our reply thereto.

THE CITY WAS NOT ENTITLED TO HOLD THE SECURITY UNTIL ITS DEPOSITS WERE REPAID IN FULL, INASMUCH AS THE PLEDGE OF ASSETS CONSTITUTING SUCH SECURITY WAS ULTRA VIRES, ILLEGAL AND VOID. THEREFORE, THE RECEIVER WAS ENTITLED TO RECOVER THE PAYMENTS MADE TO THE CITY IN RELIANCE UPON THE ERRONEOUS ASSUMPTION THAT THE PLEDGE OF ASSETS WAS VALID.

(A) The Pledge by the Bank to Secure the City's Deposits was Ultra Vires, Illegal and Void, and Payments Erroneously Made to Redeem the Security May be Recovered.

The courts below held (R. 194, 228-229) and the petitioners concede in their brief here, (Brief, pp. 2, 10, 11, 18, 20) that the pledge securing the City's deposits was *ultra vires*. Petitioners also made such concession in the Circuit Court of Appeals (R. 229). The reasoning supporting this position may here be briefly summarized preliminary to, and as a primary basis for, the subsequent discussion of the issues now before this Court.

The Act of June 25, 1930, (c. 604, 46 Stat. 809, U. S. C. title 12, sec. 90) hereinafter designated, for convenience, as

the "Enabling Amendment," authorized, for the first time, national banks to secure deposits of public funds of a state, or of any political subdivision thereof, where the banks were located in states in which state banks possessed such power. *Marion* v. *Sneeden*, (1934) 291 U. S. 262, 268-9. The Enabling Amendment provides as follows:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

Consequently, the *initial* question in the courts below was whether the state of New York had conferred upon banks organized under its law, the power to give security for deposits of the petitioners. See, by analogy: *Marion* v. *Sneeden, supra*, p. 266; *Lewis* v. *Fidelity Co.*, (1934) 292 U. S. 559, 564; *McNair* v. *Knott*, (1937) 302 U. S. 369, 371. That question could only be authoritatively answered by either state statutory authority or by the decisions of the highest court of the state holding that such power existed in the state banks. *Marion* v. *Sneeden, supra*, pp. 269, 271. Neither form of such authority existed so far as the security given to cover the deposits involved in the present litigation is concerned, and therefore the pledge was *ultra vires*. *State Bank of Commerce* v. *Stone*, (1933) 261 N. Y. 175; *City of Mount Vernon* v. *Mount Vernon Trust Co.*, (1936) 270 N. Y. 400.

The federal courts have held that such an unauthorized pledge by a national bank is not only *ultra vires*, but is illegal and void, that the intended pledgee acquires no title or right in the pledged security, and that the same remains the asset of the bank; and further, that no rights accrue in favor of the pledgee from such illegal pledge. In this connection this Court stated in *Texas & Pacific Ry.* v. *Pottorff*, (1934) 291 U. S. 245, 260-261:

"The receiver is not estopped to deny the validity of the pledge. The Railway's argument is that the bank could not set up the defence of *ultra vires* since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. Neither branch of the argument is well founded. The bank itself could have set aside this transaction. It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. *California Bank* v. *Kennedy*, 167 U. S. 362; *McCormick* v. *Market Bank*, 165 U. S. 538; *Central Transportation Co.* v. *Pullman Co.*, 139 U. S. 24. But even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge. The unauthorized pledge reduced the assets available to the general creditors. It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so."

In *Central Transp. Co.* v. *Pullman's Car Co.*, (1891) 139 U. S. 24, this Court stated (at p. 59):

"A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, *is not voidable only, but wholly void, and of no legal effect.* The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." (Italics inserted)

In addition to the foregoing decisions may be noted the cases next cited, holding:

(a) such unauthorized pledges are void:

LaParr v. *City of Rockford, Ill.*, (C. C. A. 7th, 1938) 100 F. (2d) 564, 566 *cert.* denied (1939) 307 U. S. 624; *Hood* v. *Hardesty*, (C. C. A. 4th, 1938) 94 F. (2d) 26, 29, *cert.* denied (1938) 303 U. S. 661; *Redfield Independent School Dist. No. 20* v. *Schnetzer*, (C. C. A. 8th, 1938) 94 F. (2d) 257, 258; *City of Fort Worth* v. *McCamey*, (C. C. A. 5th, 1937) 93 F. (2d) 964, 967, *cert.* denied (1938) 304 U. S. 571; *Queenan* v. *Mays*, (C. C. A. 10th, 1937) 90 F. (2d) 525, 533, *cert.* denied (1937) 302 U. S. 724; *Leonard* v. *Gage*, (C. C. A. 4th, 1938) 94 F. (2d) 19, 23, 24, *cert.* denied (1938) 303 U. S. 653; *City of Chicago* v. *Joseph*, (C. C. A. 7th, 1938) 95 F. (2d) 444, 446, 447, *cert.* denied (1938) 304 U. S. 578; *Illinois Cent. R. Co.* v. *Rawlings*, (C. C. A. 5th, 1933) 66 F. (2d) 146, 149, *cert.* denied (1934) 291 U. S. 668; *Baltimore & O. R. Co.* v. *Smith*, (C. C. A. 3rd, 1932) 56 F. (2d) 799, 801;

(b) unless validated prior to closing of the National bank by subsequent legislation as in:

McNair v. *Knott*, (1937) 302 U. S. 369-371; *cf. Lewis* v. *Fidelity Co.*, (1934) 292 U. S. 559, 570;

(c) because their consummation would contravene the provisions of the National Bank Act forbidding preferences and requiring a ratable distribution to all of the bank's creditors. An *ultra vires* and void pledge cannot be legalized or validated once the bank has closed and the interests of other creditors have become fixed:

City of Fort Worth v. *McCamey*, (C. C. A. 5th, 1937) 93 F. (2d) 964, 969, *cert.* denied (1938) 304 U. S. 571; *Webb* v. *American Surety Co. of New York*, (C. C. A. 5th, 1937) 88 F. (2d) 171, 174; *Ross* v. *Lee*, (S. D. Fla. 1936) 15 F. Supp. 972, 973;

(d) such a pledge cannot be made enforceable by any doctrine of estoppel:

LaParr v. *City of Rockford, Ill.*, (C. C. A. 7th, 1938) 100 F. (2d) 564, 568, *cert.* denied (1939) 307 U. S. 624; *Granzow* v. *Village of Lyons, Ill.*, (C. C. A. 7th, 1937) 89 F. (2d) 83, 85; *Adams* v. *Cribbis*, (D. Colo. 1936) 17 F. Supp. 723, 725.

The receiver of an insolvent national bank is an administrative officer of the United States. *In re Chetwood*, (1897) 165 U. S. 443, 458; *United States* v. *Weitzel*, (1918) 246 U. S. 533, 541; *Steele* v. *Randall*, (C. C. A. 8th, 1927) 19 F. (2d) 40, 42; *Liberty Nat. Bank* v. *McIntosh*, (C. C. A. 4th, 1927) 16 F. (2d) 906, 909; *Hood* v. *Hardesty*, (C. C. A. 4th, 1938) 94 F. (2d) 26, 29; *Cooper* v. *O'Connor*, (D. C. App. 1938) 99 F. (2d) 135, 139; *Cooper* v. *O'Connor*, (D. C. App. 1939) 105 F. (2d) 761, 763.

Payments voluntarily made by national bank receivers and other officers of the United States under a mistake of law may be recovered. *Wisconsin Central Rd.* v. *United States*, (1896) 164 U. S. 190, 212; *Leonard* v. *Gage*, (C. C. A. 4th, 1938) 94 F. (2d) 19, 24, *cert.* denied (1938) 303 U. S. 653; *Hood* v. *Hardesty*, (C. C. A. 4th, 1938) 94 F. (2d) 26, 29, *cert.* denied (1938) 303 U. S. 661; *Granzow* v. *Village of Lyons, Ill.*, (C. C. A. 7th, 1937) 89 F. (2d) 83, 85; *Redfield Independent School Dist. No. 20* v. *Schnetzer*, (C. C. A. 8th, 1938) 94 F. (2d) 257, 259; *O'Connor* v. *Rhodes*, (D. C. App. 1935) 79 F. (2d) 146, 152; *Inland Waterways Corporation* v. *Hardee*, (D. C. App. 1938) 100 F. (2d) 678, 685, 688, 690.

(B) The Policy and Provisions of the National Bank Act Control the Consequences of the Pledge, and Not the Common Law of New York.

Petitioners concede (Pet. Brief pp. 11, 18) that under the federal decisions, assets illegally pledged by a national bank to secure deposits of the kind here in question may be recovered by the receiver of the bank without first making

repayment of the deposit (citing, *inter alia, Texas and Pacific Ry.* v. *Pottorff, supra*). Petitioners further state (Pet. Brief pp. 11, 18), that in New York a pledge by a state bank to secure deposits of the type here involved is *ultra vires*, but the security can not be recovered without first making repayment of the deposit (citing, *inter alia, State Bank of Commerce* v. *Stone, supra*). Petitioners also state in this connection (Pet. Brief pp. 11, 18) that the position of the City is that the New York law fixes the consequences of such a pledge made by a national bank in New York "because there is no federal statute law on the subject and there is no federal common law." (Citing *Erie R. Co.* v. *Tompkins*, (1938) 304 U. S. 64).

Respondents' reply to this position is, in brief, that the absence of any provision in the Enabling Amendment with respect to the *effect* or consequences of an unauthorized and illegal pledge by a national bank does not permit the law of the State of New York to *complement* the Enabling Amendment and to thereby govern the consequences of an *ultra vires* pledge made by a national bank and that petitioners' contentions in this respect are contrary to the clearly indicated policies implicit in the provisions of the national banking laws.

To the effect that a state can not, even by statute, much less by its common law, supplement or complement the national banking law so as to supply consequences or effects not specifically provided for or intended by the federal statute, see *Easton* v. *Iowa*, (1903) 188 U. S. 220, 236-37, where this court said:

> "A leading case in which this court had occasion to consider the limitation of legislation by a State affecting a subject within the scope of action by Congress is that of *Prigg* v. *Pennsylvania*, 16 Pet. 539, from which we quote the following observations:
>
> "'If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot

be that state legislatures have a right to interfere, and, as it were, *by way of complement to the legislation of Congress, to prescribe additional regulations,* and what they may deem auxiliary provisions for the same purpose. In such case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it.' " (Italics inserted)

See also *Prigg* v. *Pennsylvania*, (1842), 16 Peters 539, 617-19.

We invite attention particularly to those so-called winding up provisions which govern the liquidation of insolvent national banks;—Section 5234 of the Revised Statutes (U. S. C., title 12, sec. 192); Section 5236 of the Revised Statutes (U. S. C., title 12, sec. 194); Section 5242 of the Revised Statutes (U. S. C., title 12, sec. 91). These, as well as other provisions in the National Bank Act, constitute "a complete system for the establishment and government of national banks * * *, the winding up of the institutions and the distribution of their effects." *Cook County Nat. Bank* v. *United States*, (1882) 107 U. S. 445, 448; *Easton* v. *Iowa, supra.*

The case of *Erie R. Co.* v. *Tompkins*, (1938) 304 U. S. 64, relied upon by petitioner as requiring the New York law to be applied in determining the effect of the *ultra vires* pledge, is of no assistance to the petitioners here because, as above indicated, the national banking laws, as construed by the federal decisions, establish a federal policy governing national banks, including the pledge of their assets to secure deposits and the effect of illegal pledges. Consequently, the doctrines of the *Erie Railroad* case require the application of this federal policy rather than the policy indicated by the New York decisions. A discussion of this case will be helpful in determining its application here.

In *Erie R. Co. v. Tompkins, supra,* this Court, in a personal injury action originally brought in the federal court upon the jurisdictional basis of diversity of citizenship, had before it for reconsideration Section 34 of the Federal Judiciary Act of 1789 (U. S. C., title 28, sec. 725), frequently referred to as the Rules of Decision Act. This Act provides as follows:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In deciding *Erie R. Co.* v. *Tompkins, supra,* this Court disapproved the doctrine previously recognized under *Swift* v. *Tyson,* (1842) 16 Peters 1, and in addition this Court broadened the construction of the word "laws" in Section 34 of the Federal Judiciary Act of 1789 so as to embrace the case law as well as the statutory law of the states. Mr. Justice Brandeis stated the new doctrine as follows (at page 78):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal *general* common law." (Italics inserted.)

While the federal jurisdiction in *Erie R. Co.* v. *Tompkins, supra,* rested on diversity of citizenship, the federal jurisdiction in the instant cases rests upon the fact that these are cases for the winding up of the affairs of a national banking association. Section 563 of the Revised Statutes (U. S. C., title 28, sec. 41 (16)).

In a decision handed down the same day as the *Erie Railroad Co.* case, Mr. Justice Brandeis, in the case of

Hinderlider v. *LaPlata Co.*, (1938) 304 U. S. 92, stated (at page 110):

> "* * * For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive. * * * Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions."

Thus, in the *Erie R. Co.* v. *Tompkins* case, this court stated that there is no federal *general* common law, and in the *Hinderlider* case, on the same day, stated there is a federal common law. The fact that the *Erie Railroad* case and the *Hinderlider* case were decided the same day clearly indicates that conflicting doctrines were not intended, and that this Court recognized that there always has been and still is a *special* federal common law operating in fields occupied by Congress, such as Interstate Commerce, Patent Law, Federal Taxation, Bankruptcy Law, and the Liquidation of National Banks. See: *Schulman, The Demise of Swift* v. *Tyson*, 47 Yale Law Journal 1336, 1350.

This is pointed out again in the decision of this Court handed down on December 18, 1939, in the case of *Board of County Commissioners* v. *United States*, No. 14, October Term 1939, 84 L. Ed. 233. This was a suit by the United States to recover taxes on behalf of an Indian. The taxes had been levied upon land in Kansas from 1919 to 1935, during which time the Indian held the land under a fee simple patent. Previously, the Government held the land under a trust patent for the benefit of the Indian. The fee patent for the land was canceled in 1935 and the suit begun. The District Court rendered judgment for the Government and the Circuit Court of Appeals affirmed. Certiorari was granted on the question of the Government's right to interest before judgment. Under the Kansas law, it is settled that a taxpayer may not recover interest from a county for

taxes wrongfully collected. The federal statutes upon which the suit was grounded contain no provisions regarding interest. A judicial rule regarding interest in that particular kind of case had not yet been formulated by this Court. The question was new. This Court modified the judgment below so as to exclude interest, stating that under its own doctrines of equity controlling the recovery of interest by the Government in analogous situations, it did not consider that interest should be charged. The opinion stated (at page 235):

> "The starting point for relief in this case is the Treaty of 1861, exempting M-Ko-Quah-Wah's property from taxation. Effectuation of the exemption is, of course, entirely within congressional control. *But Congress has not specifically provided for the present contingency, that is, the nature and extent of relief in case loss is suffered through denial of exemption.* It has left such remedial details to judicial implications. Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the lawmaking agencies of Kansas. *Cf. Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487." (Italics inserted.)

According to our interpretation of this decision, it is reasonable to assume that the rule therein formulated, forbidding the recovery of interest on taxes improperly paid in connection with Indian land, now controls tax refunds among all the states no matter what the local law is as determined by the state courts. Likewise it seems reasonable to assume that the Supreme Court rule laid down in 1934 in the *Pottorff* and *Sneeden* cases,—that an illegally secured depositor of a national bank is not entitled to a refund in full of the deposit as a condition precedent to recovery by the receiver of the assets illegally pledged, and that such depositor has no greater rights than a general creditor,—now controls in similar cases in each state, no

matter what the local law may be. Inasmuch as the pledge involved in the instant case is *ultra vires* and void, the petitioners belong to the general creditor class.

It is recognized that under the decision in *Erie R. Co.* v. *Tompkins, supra,* the Federal courts are now required to give the same effect to state common law as they were heretofore required to give to a state statute. Consequently, the questions raised by petitioners under Point I of their brief may be solved by inquiring into the effect of state statutes on national banks.

This Court has held time and again that state statutes *inconsistent* with the policy or provisions expressly indicated in, or reasonably implied from, the National Bank Act, are inapplicable to national banks. In *Jennings* v. *U. S. F. & G. Co.*, (1935) 294 U. S. 216, this Court in considering whether an Indiana statute controlled a national bank in Indiana said (at page 219):

> "There was in force in Indiana in 1931 a statute known as the Bank Collection Code (Indiana Acts, 1929, c. 164), which is applicable to national banks in so far as it is consistent with the policy or provisions, express or reasonably implied, of the National Bank Act or of other Federal acts of paramount authority. *Lewis* v. *Fidelity & Deposit Co. of Maryland*, 292 U. S. 559, 566; *First National Bank* v. *Missouri*, 263 U. S. 640, 656."

Continuing, the court said (at page 225, 226):

> "What is regulated in that section is not the relation between a bank and its correspondents during the normal course of business. What is regulated is the relation and the remedy when insolvency has set in and business is suspended. Then for the first time a trust comes into being through the action of the statute, . . . A trust so created, to arise upon insolvency, is a preference under another name. As applied to a national bank, the preference is plainly inconsistent with the system of equal distribution established by the federal law. R. S. sec. 5236; 12 U. S. C., sec. 194; *Davis* v.

Elmira Savings Bank, 161 U. S. 275, 283, 284; *Easton* v. *Iowa*, 188 U. S. 220, 229; *Cook County National Bank* v. *United States*, 107 U. S. 445; *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245; *Lewis* v. *Fidelity & Deposit Co. of Maryland*, *supra*. **The power of the nation within the field of its legitimate exercise overrides in case of conflict the power of the states.**" (Emphasis ours)

In *Davis* v. *Elmira Savings Bank*, (1896) 161 U. S. 275, this Court reversed a decision of the New York Court of Appeals and held that a New York statute which granted a preference status to a deposit made by a savings bank was void as applied to an insolvent national bank, because it was in conflict with the policy of ratable distribution contained in the National Bank Act. In determining that there *was* a conflict between the New York law involved and the National Bank Act, this Court stated (at page 284):

> "* * *. It cannot be doubted that one of the objects of the national bank system was to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among all unsecured creditors, and to prevent such banks from creating preferences in contemplation of insolvency. This public aim in favor of all the citizens of every State of the Union is manifested by the entire context of the national bank act."

In *California Bank v. Kennedy* (1897), 167 U. S. 362, it was held, at page 366:

> "It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. *Logan County Bank* v. *Townsend*, 139 U. S. 67, 73."

And see:

> *Guthrie* v. *Harkness*, (1905), 199 U. S. 148, 159;
> *First Nat. Bank* v. *California*, (1923), 262 U. S. 366, 368, 369, 370.

The states can exercise no control over national banks, nor in any wise affect their operation, except in so far as Congress may see fit to permit.

Farmers' Etc. Nat. Bank v. *Dearing*, (1875) 91 U. S. 29, 34.

Cook County Nat. Bank v. *United States*, (1882) 107 U. S. 445, 448.

Davis v. *Elmira Savings Bank*, (1896) 161 U. S. 275, 284.

Jennings v. *U. S. F. & G. Co.*, (1935) 294 U. S. 216, 226.

It must follow, therefore, that even under the *Erie R. Co.* v. *Tompkins* case (which places state common law on the same footing as state statute), the rule followed by the highest court of New York in denying the right of a receiver of a state bank to recover the proceeds of an illegal pledge without restoring the deposit, is inapplicable to national banks if it is inconsistent with the policy or provisions, express or reasonably implied, of the National Bank Act. The decisions of this Court in the *Pottorff* and *Sneeden* cases, as well as the numerous decisions of the lower federal courts holding that receivers of national banks may recover proceeds of illegal pledges or preferential payments made in reliance upon such pledges, without restoring the deposits, seem clearly to be based upon the policy and provisions of the National Bank Act designed to insure a ratable distribution of assets upon insolvency.[1]

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[1] *LaParr* v. *City of Rockford, Ill.* (C. C. A. 7th, 1938) 100 F. (2d) 564, 567, *cert.* denied 307 U. S. 624; *Joseph* v. *Village of Downers Grove*, 104 F. (2d) 974, 979, *cert.* denied 84 L. Ed. 100; *Inland Waterways Corporation* v. *Hardee*, (App. D. C. 1938) 100 F. (2d) 678, 688, 690; *City of Chicago* v. *Joseph*, (C. C. A. 7th, 1938), 95 F. (2d) 444, 446, 447, *cert.* denied 304 U. S. 578; *Hood* v. *Hardesty*, (C. C. A. 4th, 1938) 94 F. (2d) 26, 29, *cert.* denied 303 U. S. 661; *Redfield Independent School Dist. No. 20* v. *Schnetzer* (C. C. A. 8th., 1938) 94 F. (2d) 257, 258; *Leonard* v. *Gage*, (C. C. A. 4th, 1938) 94 F. (2d) 19, 24, 25, *cert.* denied 303 U. S. 653; *City*

If state legislation is unavailing, as applied to national bank receivership liquidation, because contrary to an Act of Congress as construed by the federal courts, any rule of law followed by state courts affecting state banks is unavailing, if contrary to an Act of Congress, as construed by the federal courts.

In *Awotin* v. *Atlas Exchange Bank*, (1935) 295 U. S. 209, this Court reviewed a decision of a state court construing the validity of a repurchase agreement made by a national bank, under which the bank had agreed in writing to repurchase certain bonds on maturity, at par and accrued interest. It was not clear from the decision of the state court whether its conclusion rested upon that court's interpretation of the rules of state law governing the quasi contractual right to compel restitution of the purchase price, or whether its decision was upon the state court's construction of the federal statute. Whether or not the lower court's decision was based upon federal or state law, this Court stated (at p. 213):

> "But we have jurisdiction of the cause to review the ruling of the state court that the express contract was rendered invalid by the federal statute."

It was then stated that this Court could appropriately determine whether the federal statute precludes recovery of the purchase money, and the conclusion was reached that

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of Fort Worth v. *McCamey*, (C. C. A. 5th, 1937) 93 F. (2d) 964, 967, 968; *cert.* denied 304 U. S. 571; *Queenan* v. *Mays* (C. C. A. 10th, 1937) 90 F. (2d) 525, 533, *cert.* denied 302 U. S. 724; *Granzow* v. *Village of Lyons*, Ill., (C. C. A. 7th, 1937) 89 F. (2d) 83, 85; *Webb* v. *American Surety Co. of New York*, (C. C. A. 5th, 1937) 88 F. (2d) 171, 174; *Buckley* v. *Southwestern Nat. Bank*, (C. C. A. 3rd, 1937) 88 F. (2d) 263; *Utter* v. *Eckerson* (C. C. A. 9th, 1935) 78 F. (2d) 307, 310; *Illinois Cent. R. Co.* v. *Rawlings*, (C. C. A. 5th, 1933) 66 F. (2d) 146, 149 *cert.* denied 291 U. S. 668; *Baltimore & O. R. Co.* v. *Smith*, (C. C. A. 3rd, 1932) 56 F. (2d) 799, 802; *Adams* v. *Cribbis* (D. Colo. 1936) 17 F. Supp. 723, 725; *Faircloth* v. *Atlantic City*, (D. N. J. 1936) 16 F. Supp. 131, 132; *Harrell* v. *Lawhead*, (N. D. W. Va. 1936) 13 F. Supp. 298, 299.

such was the effect of the federal statute. The reason for this holding is stated as follows (at p. 214):

> "The invalidity of the contract was not due to the mere absence of power in the bank to enter into it, in which case restitution, not inequitable to the bank or inimical to the public interest, might be compelled. See Logan County Bank v. Townsend, supra, 74, 75; Hitchcock v. Galveston, 96 U. S. 341, 350. The contract is invalid because it is within the broad sweep of the statute which by mandatory language sets up definite limits upon the liability which may be incurred by a national bank, in the course of its business of dealing in securities, by confining the business to buying and selling 'without recourse.' The phrase is broader than a mere limitation upon the power to contract, although embracing that limitation. It is a prohibition of liability, whatever its form, by way of 'recourse' growing out of the transactions of the business. See Bank of United States v. Owens, 2 Pet. 527, 537; Brown v. Tarkington, 3 Wall. 377, 381; Thomas v. Richmond, 12 Wall. 349, 356; Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 262. National banks are public institutions and the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank. The prohibition would be nullified and the evil sought to be avoided would persist, if, notwithstanding the illegality of the contract to repurchase, the buyer, upon tender of the bonds, could recover all that he had paid for them. Such a construction of the statute is inadmissible."

There are five federal statutes, all contained in the National Bank Act, which must be considered in determining this case. As the bulk of the illegal payments were made by the Conservator, we call attention to Section 203 of the Bank Conservation Act of March 9, 1933 (U. S. C. title 12, sec. 203) which provides that the rights of all parties with respect to a bank in charge of a Conservator are the same

as if a Receiver had been appointed therefor. Section 5234 of the Revised Statutes, (U. S. C. title 12, sec. 192) provides that a Receiver of a national bank, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association and shall collect all debts, dues and claims belonging to it. Section 5242 of the Revised Statutes (U. S. C. title 12, sec. 91) forbids transfers of assets and payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to the preference of one creditor over other creditors and provides that such transfers or payments shall be utterly null and void. Section 5236 of the Revised Statutes (U. S. C. title 12, sec. 194) provides for the ratable distribution of the insolvent national bank's assets to all creditors. The Enabling Amendment is the only statute authorizing national banks to give security for the safekeeping and prompt payment of deposits of public money of a political subdivision of a state.

When a national bank closes, the rights of all depositors and other creditors attach, and from that time on, the disposition of the assets of the bank is a vital concern to such creditors. As stated in *Adams* v. *Champion*, (1935) 294 U. S. 231, 238:

> "* * * new duties had arisen, new interests had intervened. The assets were now held by the receiver upon a trust for equal distribution."

Consequently, the performance of an *ultra vires* pledge, or overpayments made in reliance thereon, constitutes an attempt to dispose of assets, to which all creditors are entitled, in a manner directly forbidden by the express mandate of Congress, to which reference has been made.

Judge Parker, in *Leonard* v. *Gage*, *supra*, states, in his opinion at p. 24:

> "And we think it clear that the proceeds of the collateral applied in extinguishment of the deposit accounts can be recovered for another reason. To permit the receivers of the failed national bank to thus apply their assets on unsecured claims would be to sanction

the violation of the statutes forbidding preferences and requiring the equal and ratable distribution of the assets. See 12 U. S. C. A. Secs. 91, 194; Illinois Cent. R. Co. v. Rawlings, 5 Cir., 66 F. 2nd 146, 149; Adams v. Cribbis, D. C., 17 F. Supp. 723.

The doctrine that a court will not disturb a fully and completely executed illegal contract, but will leave the parties where it finds them, does not apply here, for the depositors and other creditors of the bank were not in *pari delicto* with the beneficiaries of the wrongful payments, and the receiver, as their official representative, may not thus be deprived of his remedy to recover on their behalf. *LaParr* v. *City of Rockford, Ill., supra; Webb* v. *American Surety Co. of New York, supra; City of Fort Worth* v. *McCamey,* (C. C. A. 5th, 1937) 93 F. (2d) 964.

Comparable defenses have been asserted by illegally secured depositors in other cases involving suits by national bank receivers to recover the proceeds of pledged assets, or preferential payments made in reliance upon *ultra vires* pledges, and the courts have refused to apply state court decisions in support of any rule of estoppel, or otherwise, which might have defeated a similar suit by a state bank receiver. Since *Erie R. Co.* v. *Tompkins,* (1938) 304 U. S. 64, was submitted to this Court for decision, *certiorari* has been denied in a number of cases where the petitioners asserted that the decisions of the Circuit Courts of Appeal in favor of the national bank receivers were in conflict with state court decisions. *City of Chicago* v. *Joseph,* (C. C. A. 7th, 1938) 95 F. (2d) 444, *cert.* denied (1938) 304 U. S. 578; *Hood v. Hardesty,* (C. C. A. 4th, 1938) 94 F. (2d) 26, *cert.* denied (1938) 303 U. S. 661; *LaParr* v. *City of Rockford, Ill.* (C. C. A. 7th, 1938) 100 F. (2d) 564, *cert.* denied (1939) 307 U. S. 624. *Certiorari* petitions have been denied in similar cases involving suits by national bank receivers to recover illegal preferences, but where no conflict with state law was involved.

Joseph v. *Village of Downers Grove,* (C. C. A. 7th, 1939) 104 F. (2d) 974, *cert.* denied (1939) 84 L. Ed. 100;

Leonard v. *Gage*, (C. C. A. 4th, 1938) 94 F. (2d) 19, *cert.* denied (1938) 303 U. S. 653;
City of Fort Worth v. *McCamey*, (C. C. A. 5th, 1937) 93 F. (2d) 964, *cert.* denied (1938) 304 U. S. 571;
Queenan v. *Mays*, (C. C. A. 10th, 1937) 90 F. (2d) 525, *cert.* denied (1937) 302 U. S. 724;
Illinois Cent. R. Co. v. *Rawlings*, (C. C. A. 5th, 1933) 66 F. (2d) 146, *cert.* denied (1934) 291 U. S. 668.

The First National Bank and Trust Company of Yonkers, before closing, could have set aside or rescinded the illegal pledge transaction and recovered the pledged collateral. *Texas & Pacific Ry.* v. *Pottorff*, and *Marion* v. *Sneeden, supra.* It would seem clear that as a going concern the bank would have been required to make a refund of the amount of the deposit incident to obtaining the relief sought, namely, the return of the collateral. In this connection, however, it must be borne in mind that in neither *Marion* v. *Sneeden, supra,* nor in *Texas & Pacific Ry.* v. *Pottorff, supra,* does this Court take the position that the receivership bank is under no obligation to refund the deposit; the court does take the position *that the depositor has a claim for the whole amount of the deposit, but it can be refunded only on the same basis that payments are made to the other general depositors of the receivership bank,* in compliance with the Congressional mandate that the assets shall be ratably distributed. It is clearly pointed out in the *Pottorff* decision that the making of an illegal pledge while the bank was a going concern could not result in giving the pledgee a preferential status. The *ultra vires* and void act of pledge could not create a prior or preferred right or status superior to that of the general creditors. In other words, the so-called pledgee never was a preferred creditor; at most he was, *prima facie*, a secured creditor, and a secured creditor differs from a general creditor only because he has collateral as security for his deposit. If the security is removed, he is no longer a secured creditor, and merely *retains* the status of a general creditor. Consequently, it appears clear that the status of illegally secured

depositor cannot be *converted* into the status of preferred depositor or creditor. There is not only no legal basis or reasoning which warrants the substitution of a preferential status for an illegally secured status, but to permit this assumption of a preferred creditor status would, of course, be in direct violation of the principles of pro rata distribution required by Section 203 of the Bank Conservation Act (U. S. C. title 12, sec. 203), and by Section 5236 of the Revised Statutes, and would also be in violation of Section 5242 of the Revised Statutes, specifically prohibiting preferential payments. Further, there is no basis for a preferred status on the part of the illegally secured depositor, here, inasmuch as there is no identifiable *res* and no constructive trust meeting the requirements indicated by Mr. Justice Brandeis in *Texas & Pacific Ry.* v. *Pottorff*, *supra*, at page 261.

As the consummation of such an illegal and void pledge would result in an express violation of the foregoing Federal statutes, the receiver is entitled to recover the pledged property,[2] or the proceeds of such pledged assets,[3] or any

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[2] *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 255; *Marion* v. *Sneeden*, 291 U. S. 262, 268; *Fidelity & Casualty Co. of New York* v. *Allen*, (C. C. A. 7th, 1936), 84 F. (2d) 53, 54; *Utter* v. *Eckerson*, (C. C. A. 9th, 1935), 78 F. (2d) 307, 310; *Griffin* v. *Royal* (C. C. A. 4th, 1934) 70 F. (2d) 103; *American Legion et al.* v. *Spurway et al.* (C. C. A. 5th, 1934) 69 F. (2d) 222; *Illinois Cent. R. Co.* v. *Rawlings* (C. C. A. 5th, 1933) 66 F. (2d) 146, 149, cert. denied 291 U. S. 668; *Baltimore & O. R. Co.* v. *Smith*, (C. C. A. 3rd, 1932) 56 F. (2d) 799, 801; *Evale* v. *Tremaine* (W. D. N. Y. 1938) 22 F. Supp. 171, 173; *Faircloth* v. *Atlantic City* (D. N. J.), 16 F. Supp. 131, 133; *Harrell* v. *Lawhead*, (N. D. W. Va, 1936) 13 F. Supp. 298, 299).

[3] *Joseph* v. *Village of Downers Grove*, 104 F. (2d) 974, 979, cert. denied (1939), 84 L. Ed. 100; *Inland Waterways Corporation* v. *Hardee*, (App. D. C. 1938) 100 F. (2d) 678, 685; *City of Chicago* v. *Joseph* (C. C. A. 7th, 1938), 95 F. (2d) 444, 446, cert. denied 304 U. S. 578; *Hood* v. *Hardesty* (C. C. A. 4th, 1938) 94 F. (2d) 26, 29 cert. denied 303 U. S. 661; *Redfield Independent School Dist. No. 20* v. *Schnetzer*, (C. C. A. 8th, 1938) 94 F. (2d) 257, 259; *Leonard* v. *Gage* (C. C. A. 4th, 1938) 94 F. (2d) 19, 23, cert. denied 303 U. S. 653; *City of Fort Worth* v. *McCamey*, (C. C. A. 5th, 1937)

payments made by the conservator or receiver in an attempt to redeem the pledged property under the mistake of law that the pledge was legal.[4] Likewise, by analogy may be noted the New York decisions hereinafter cited which hold that where a trustee or other fiduciary has inadvertently or even illegally disposed of the assets of his trust, he is still clothed, in his representative capacity, with authority to bring suit to recover.[5]

A national bank receiver may maintain his suit to recover, even though he consented to the sale of the pledged property with the express approval of the Comptroller of the Currency,[6] or with the express approval of the court,[7]

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93 F. (2d) 964, 967, cert. denied 304 U. S. 571; *Queenan* v. *Mays*, (C. C. A. 10th, 1937) 90 F. (2d) 525, 535, cert. denied 302 U. S. 724; *Granzow* v. *Village of Lyons, Ill.* (C. C. A. 7th, 1937) 89 F. (2d) 83, 85.

[4] *LaParr* v. *City of Rockford, Ill.* (C. C. A. 7th, 1938) 100 F. (2d) 564, 567, cert. denied 307 U. S. 624; *O'Connor* v. *Rhodes* (App. D. C. 1935) 79 F. (2d) 146, 152; *Rusch* v. *Baer*, (N. D. Ill. 1937) 18 F. Supp. 732, 734; *Inland Waterways Corporation* v. *Hardee*, (App. D. C. 1938) 100 F. (2d) 678; *Adams* v. *Cribbis*, (D. Colo. 1936), 17 F. Supp. 723, 724.

[5] *Wetmore* v. *Porter* (C. A. N. Y.), 92 N. Y. 76, 81-85; *Moss* v. *Cohen* (C. A. N. Y.), 158 N. Y. 240, 247-254; *In re Heinze's Estate*, 224 N. Y. 1; *Lee* v. *Horton*, 104 N. Y. 538, 541; *Zimmerman* v. *Kinkle*, 108 N. Y. 282, 287; *Equitable Trust Co.* v. *Miller*, 185 N. Y. S. 661, 622; *Hodgman* v. *Cobb*, 195 N. Y. S. 428, 435; *New York City Employees' Retirement System* v. *Eliot*, 267 N. Y. 193; *Bush* v. *Halstead*, 106 N. Y. S. 133, 136.

[6] *LaParr* v. *City of Rockford, Ill.* (C. C. A. 7th, 1938) 100 F. (2d) 564, 567; *Inland Waterways Corporation* v. *Hardee* (App. D. C. 1938), 100 F. (2d) 678, 688; *Hood* v. *Hardesty* (C. C. A. 4th, 1938) 94 F. (2d) 26, 27, cert. denied 303 U. S. 661; *Redfield Independent School Dist. No. 20* v. *Schnetzer* (C. C. A. 8th, 1938) 94 F. (2d) 257, 258; *Leonard* v. *Gage* (C. C. A. 4th, 1938) 94 F. (2d) 19, 23, cert. denied 303 U. S. 653; *Granzow* v. *Village of Lyons, Ill.* (C. C. A. 7th, 1937) 89 F. (2d) 83, 85; *O'Connor* v. *Rhodes* (App. D. C. 1935), 79 F. (2d) 146, 153.

[7] *LaParr* v. *City of Rockford, Ill.* (C. C. A. 7th, 1938) 100 F. (2d) 564, 566; *Redfield Independent School Dist. No. 20* v. *Schnetzer*, (C. C. A. 8th, 1938 94 F. (2d) 257, 259; *Granzow* v. *Village of Lyons*, Ill. (C. C. A. 7th, 1937) 89 F. (2d) 83, 86.

and notwithstanding the fact that when the pledge was made the depositor relied upon an express ruling of the Comptroller that it was valid.[8] The assets pledged represent trust property of the receivership;[9] and their retention after demand would be a conversion of the bank's property.[10] It is the receiver's duty to recover the assets for the benefit of all creditors,[11] and his failure so to do would permit other depositors and creditors to sue in their own right to recover such assets.[12]

Conceding that the purpose of the Enabling Amendment was to equalize the position of national and state banks in competing for public deposit business, (*Lewis* v. *Fidelity Company, supra,* and *McNair* v. *Knott, supra*) the application of the New York rule of estoppel has no bearing at all upon that purpose unless this court is prepared to say that Congress had in mind the procuring of illegal as well as legal pledge contracts by national banks. The Enabling Act admittedly applies the state law for the determination of the legality of a secured public deposit but it cannot be said that Congress intended that the *effect* of illegal pledges by national banks should be determined by the varying rules followed by the various states.

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[8] *Leonard* v. *Gage* (C. C. A. 4th, 1938) 94 F. (2d) 19, 21, cert. denied 303 U. S. 653; *City of Fort Worth* v. *McCamey,* (C. C. A. 5th, 1937) 93 F. (2d) 964, 967, cert. denied 304 U. S. 571.

[9] *Inland Waterways Corporation* v. *Hardee* (App. D. C. 1938) 100 F. (2d) 678, 685, 690.

[10] *City of Chicago* v. *Joseph* (C. C. A. 7th, 1938) 95 F. (2d) 444, 447, cert. denied 304 U. S. 578; *City of Fort Worth* v. *McCamey,* (C. C. A. 5th, 1937) 93 F. (2d) 964, 967, cert. denied 304 U. S. 571; *Webb* v. *American Surety Co. of New York* (C. C. A. 5th, 1937) 88 F. (2d) 171, 174.

[11] *Texas & Pacific Ry.* v. *Pottorff,* 291 U. S. 245, 261; *LaParr* v. *City of Rockford,* Ill. (C. C. A. 7th, 1938) 100 F. (2d) 564, 567.

[12] *City of Fort Worth* v. *McCamey,* (C. C. A. 5th, 1937) 93 F. (2d) 964, 967, cert. denied 304 U. S. 571; *LaParr* v. *City of Rockford, Ill.* (C. C. A. 7th, 1938), 100 F. (2d) 564, 567; *O'Connor* v. *Rhodes* (App. D. C. 1935), 79 F. (2d) 146, 148, affirmed on this point 297 U. S. 383.

The intent of Congress to require all depositors not holding valid security to participate in the *pro rata* distribution, and in other respects to protect the bank's assets, looking toward obtaining the maximum salvage possible, is evidenced in many federal statutes. Federal taxes are abated where the assets are insufficient to pay depositors.[13] The federal courts are given jurisdiction of suits to wind up the affairs of national banks independent of the amount involved.[14] Court approval of all sales and compromises is required,[15] and advances to protect assets can be made only upon the consent of the Secretary of the Treasury.[16] A special system of liquidation is provided independent of bankruptcy or insolvency statutes,[17] and annual reports of the results are required to be made to Congress.[18]

To summarize, if we assume that there is a conflict between the Federal rule and the local rule as to the effect of an illegal pledge by a national bank, respondent submits that the Federal rule controls, since (1) the construction, interpretation and policy of the provisions of the National Bank Act are involved; (2) the Federal rule recognized by this court in *Texas & Pacific Ry.* v. *Pottorff* and *Marion* v. *Sneeden, supra,* is attributable to the National Bank Act and (3) while the Enabling Amendment is silent on the effect of an illegal pledge, the provisions of the National Bank Act forbidding preferential payments in excess of ratable dividends expressly supply that effect.

Petitioners refer at pages 19 and 20 of their brief to the rule on *ultra vires,* as expressed in the *Restatement of the Law of Conflicts of Law,* Section 166c. We have no quarrel with this general statement of law, which would apply to the ordinary corporation, organized in one State and

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[13] U. S. C. title 12, sec. 570.
[14] U. S. C. title 28, sec. 41(16).
[15] U. S. C. title 12, sec. 192.
[16] U. S. C. title 12, secs. 198, 199.
[17] U. S. C. title 12, secs. 91, 192, 193, 194.
[18] U. S. C. title 12, sec. 14.

doing business in another State, when the act committed in the second State may be *ultra vires*. That is not the instant situation wherein we have the question of the distinction between the local law of New York on the one hand, and, on the other hand, the policy and provisions of federal statutes.

At pages 12 and 19, petitioners discuss the case of *Texas & Pacific Ry.* v. *Pottorff, supra*, and contend that the effect of an *ultra vires* contract as defined in that decision was grounded on the application by the Court of the federal common law as the rule to be followed without relation to the provisions of the National Bank Act.

Throughout the opinion the Court referred to the National Bank Act and its provisions,—express or implied,—as reasons for the conclusions reached. Thus, under point "First" (pp. 253-260), the Court indicated that the National Bank Act is a complete system for the government, supervision, and winding up of national banks, and called attention to the provisions of the Act designed to insure uniformity in the treatment of depositors and to insure a ratable distribution of assets. It was pointed out that this policy of the National Bank Act requiring equal treatment of all creditors was held even to preclude a preference to the United States.

After this very general discussion of the Act, the policy of the Act, and the powers of national banks under the Act, the Court, under point "Second" (pp. 260-261) indicated its views as to the result of unauthorized transactions by national banks, stating in unmistakable terms that even if the bank were estopped from asserting lack of power, the receiver is free to challenge the validity of the pledge. The reason for this is stated on pages 260 and 261 where the Court says that the unauthorized pledge reduced the assets available to the general creditors, and that it was the receiver's duty to set aside transactions which illegally reduce the assets available for the general creditors. Having discussed, under point "First" the provisions of the

National Bank Act requiring equal treatment and a ratable distribution of assets, and forbidding preferences, it was unnecessary for the Court, under point two, to repeat the reasons why this rule of law is peculiarly applicable to national banks and their liquidation.

Under point "Third" (pp. 261-262) the Court holds that the receiver may assert the invalidity of the pledge without repaying the pledgee's deposit in full, and holds that the argument of the Railway to the effect that it is entitled to payment in full as a result of the *ultra vires* contract, is unavailing because there is no identifiable *res* and constructive trust based on special circumstances of misconduct which would confer a preference over other creditors. It is obvious that the Court again had in mind the provisions and policy of the National Bank Act, and we submit that it was unnecessary for repetitious references to be made to these sections of the National Bank Act which expressed the congressional mandate that preferences cannot be made and that all alike must share ratably in the liquidation of an insolvent national bank.

On the same day this Court decided the *Pottorff* case it also handed down a decision likewise given by Justice Brandeis in the case of *Marion* v. *Sneeden, Receiver*, (1934) 291 U. S. 262. This decision concerning the validity of a pledge to secure a public money deposit of a city in Illinois also involved the application of the Enabling Amendment of June 25, 1930. In discussing this Amendment the Court stated at page 268:

> "A national bank could not legally pledge assets to secure funds of a State, or a political subdivision thereof, prior to the 1930 amendment; and since then it can do so legally only if it is located in a State in which state banks are so authorized."

The Court then examined the power given Illinois state banks and came to the conclusion that banks organized under the laws of Illinois do not possess the power of pledging assets to secure the deposit of public moneys of a polit-

ical subdivisions. After deciding that the pledge of assets made by the national bank in Illinois to secure the deposit of the city of Marion was illegal, this Court stated at page 272:

> "Since the Herrin bank was without power to make the pledge of bonds here in question, its receiver is entitled to recover them unconditionally in order that they may be administered for the benefit of the general creditors of the bank. See *Texas & Pacific Ry. Co.* v. *Pottorff, ante*, p. 245."

On pages 12 and 19 of their brief petitioners also state that the case of *State Bank of Commerce* v. *Stone, supra,* was simply cited in the *Pottorff* case as *contra,* "instead of distinguishing the *Pottorff* case as one construing a statute." *State Bank of Commerce* v. *Stone* is referred to in Note 17 of this Court's opinion in the *Pottorff* case as being *contra* to other authorities therein cited on the question of estoppel in pledge cases. The rule of estoppel upheld in the *State Bank of Commerce* case was discussed at length in the briefs filed by both petitioner and respondent in this Court in the *Pottorff* case and was likewise so discussed at length in the briefs filed with this Court in the companion case of *Marion* v. *Sneeden, supra,* decided the same day. The *Stone* case was also discussed at length and the rule of estoppel therein referred to was approved by Circuit Judge Alschuler in his *dissenting opinion* in the Circuit Court of Appeals in the *Sneeden* case, 64 F. (2d) 721, 731, 734. But of course, this view as to the effect of an *ultra vires* pledge was rejected by the majority at pages 729 and 730 and by this Court in deciding *Marion* v. *Sneeden, supra,* and *Texas & Pacific Ry.* v. *Pottorff, supra.*

It is thus clear that the case of *State Bank of Commerce* v. *Stone* was not merely cited by the court as *contra,* but that the case was cited only after careful consideration of the doctrine of estoppel as therein set forth, and that notwithstanding such consideration of that case, this Court deliberately held that the rule of estoppel could not be

invoked in national bank receivership cases so as to defeat the plain purposes and objectives of the national banking laws.

On pages 13 and 22 of their brief, petitioners contend, in effect, that inasmuch as the pledge in the instant case was made before insolvency, the consequent lien arising therefrom arose prior to insolvency and hence is binding notwithstanding subsequent insolvency. The obvious answer to this contention is that no lien could possibly arise from an invalid, illegal pledge. This is not a situation such as was involved in *Lewis* v. *Fidelity Co.*, 292 U. S. 559, where this Court held that an Act of Congress, authorizing an agreement for security, previously *ultra vires*, removed one of the obstacles to the original agreement and permitted the lien to become operative from the date of the Act.

In *Lewis* v. *Fidelity Co.*, *supra*, this Court held, at page 564:

> "In *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, decided after the entry of the judgment below, we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress. It follows that, in 1928, no lien arose when the bank was appointed depository; and that the judgment of the Circuit Court of Appeals must be reversed unless the Act of June 25, 1930, c. 604, 46 Stat. 809, authorizes a national bank to give as security a general lien of the character prescribed by the Georgia statutes."

and at page 570:

> "The appointment was within the power of the State to confer and of the bank to accept, but by reason of the paramount federal law one of the anticipated incidents of the relation, the lien, could not arise. When that obstacle was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties; and the lien became operative as to deposits thereafter made and is entitled to priority from the date of the Act."

(C) The New York Law as to the Consequences of the Pledge Was Not Incorporated in the National Bank Act by Reference.

Notwithstanding petitioners concede that the pledge in the instant cases is *ultra vires*, nevertheless they contend that inasmuch as the New York law permits the depositor to retain the pledge until his deposit is paid in full, the "*de facto*" validity of the pledge transaction is thereby recognized, and is thereby "authorized" within the meaning of that term as used in the Enabling Amendment. In other words, it is contended that the Enabling Amendment absorbs the state general rule of estoppel. The Circuit Court of Appeals in the instant case answered this argument as follows:

> "* * * a pledge which is '*ultra vires*' cannot be said to be authorized." (R. 229)
>
> "* * * the words 'authorized by the law of the state' plainly relate to the authority of state banks under their charters and not to the effect to be given to their *ultra vires* acts." (R. 230-231)

Restated, the fact that the New York law erects an estoppel and thereby enables the public depositor in a state bank to retain the pledge until the deposit is paid in full, does not thereby convert the *ultra vires* pledge into a legal, valid, *intra vires*, or authorized pledge.

It would seem perfectly clear that invocation of the rule of estoppel preventing rescission of an illegal and *ultra vires* transaction without first returning the consideration received thereunder, performs no amendatory operation upon, and has no interpretative relation to, the charter powers of a bank, whether state or national. The distinction must be recognized, however, that while the New York rule of estoppel may have the effect, in the case of a state bank, of virtually nullifying the state law prohibiting pledges of assets by state banks to secure public deposits, nevertheless the state law invoking estoppel as to state

banks cannot defeat the purpose and policy of the federal statutes prohibiting such pledges by national banks. In this connection, and in considering the relation of the rule of estoppel to the prohibition of pledges of assets by national banks to secure deposits, this Court said, in *Texas & Pacific Ry.* v. *Pottorff, supra* (p. 260):

> "It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. *California Bank* v. *Kennedy*, 167 U. S. 362; *McCormick* v. *Market Bank*, 165 U. S. 538; *Central Transportation Co.* v. *Pullman Co.*, 139 U. S. 24."

While the Texas and Pacific Railway case concerned the private deposit of the railway, and not a public deposit of a state or political subdivision thereof, the Court necessarily analyzed and applied the national banking statutes and the policies provided thereunder relating to the powers of national banks, including consideration of the Enabling Amendment and the nonapplication of the rule of estoppel. (See discussion herein, *supra* p. 29). The doctrines there established,—including the principles that no rights can arise on an *ultra vires* contract, and that an estoppel cannot be erected to defeat the purposes of the national banking statutes—apply with equal force to the situation where a national bank has made an *ultra vires* pledge of assets to secure the deposit of a political subdivision of a state under the supposed "*authority*" of the Enabling Act; and, as heretofore pointed out (*supra* p. 31), this Court so held in the companion case of *Marion* v. *Sneeden, supra.*

The word "authorized" as used in the Enabling Amendment, must be taken to have its usual connotations: "possessed of, or endowed with, authority * * * sanctioned or approved by authority"; the word "authority" is defined as "legal or rightful power"—*Webster's New International Dictionary, 1936.* The Circuit Court of Appeals in

the instant case, in examining into the meaning of the word "authorized" as used in the Enabling Act, held that the words "authorized by the law of the State" plainly related to the authority of State banks under their charters and not to the effect to be given to their *ultra vires* acts (R. 230). The Court also held that a pledge which is "*ultra vires*" cannot be said to be "authorized" (R. 229). It was also pointed out in the Circuit Court of Appeals opinion (R. 229):

> "So far as the Act of June 25, 1930, may be thought to require an authorization of State banks to make pledges as a prerequisite for pledges by national banks, it does not apply here."

It would seem obvious that the purpose of the Enabling Act,—to permit national banks to compete with State banks for deposits of public moneys,—does not contemplate that national banks may override the prohibitory provisions of the Enabling Act and perform *ultra vires* acts in competing for such business, particularly in view of the fact that such course would defeat the policy and provisions of the winding-up provisions of the national banking laws which immediately become effective upon the closing of a national bank and are designed to insure *pro rata* distribution of assets and to prevent preferential payments. The court below, in analyzing this situation, states (R. 229):

> "The banks of the State cannot give security in a case like this without violating their charters; Congress could not have intended to meet that type of competition."

Preferential payments or transfers of assets made by national banks in contemplation of, or after the commission of, an act of insolvency, with a view to creating a preference, are null and void under Section 5242 of the Revised Statutes, and this section forges a strong weapon in assisting the Comptroller and the receiver to enforce the ratable distribution provision contained in Section 5236 of

the Revised Statutes. The absence of a similar statute forbidding preferences in the New York banking law may well be the reason for the failure of its courts to enforce the ratable distribution statutes in the State banking law.[19] In no single case involving similar suits by national bank receivers to recover assets pledged under an *ultra vires* contract, or preferential payments made in reliance upon such an *ultra vires* pledge, have the federal courts in any State applied the construction which the New York courts have given in similar suits by State bank receivers wherein return of the deposit in the State bank is held to be a condition precedent to recovery of the pledged collateral or its proceeds.[19] This defense, then, in the numerous suits by national bank receivers which have been adjudicated since this Court handed down the *Pottorff* and *Sneeden* decisions in 1934, has never been successfully asserted in any federal court in any State. The reason for this is obvious; the federal courts have looked to the policy and provisions of the whole National Bank Act in determining the results to be attained in other similar suits. *Illinois Cent. R. Co.* v. *Rawlings*, (C. C. A. 5th, 1933) 66 F. (2d) 146, 149, *cert.* denied (1934) 291 U. S. 668; *Leonard* v. *Gage*, (C. C. A. 4th, 1938) 94 F. (2d) 19, 24, *cert.* denied (1938) 303 U. S. 653; *Hood* v. *Hardesty*, (C. C. A. 4th, 1938) 94 F. (2d) 26, 29, *cert.* denied (1938) 303 U. S. 661; *Adams* v. *Cribbis*, (D. Colo. 1936) 17 F. Supp. 723. Also see cases herein cited in footnotes 2-4, 6-12, *supra* pages 25-27.

With reference to the comments on pages 28-29 of petitioners' brief concerning competition between state and national banks in New York, we assume there is no suggestion by petitioners as to any lack of competition among state and national banks for deposits of public money of the state

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[19] Sections 625, 627 N. Y. Banking Law. The New York Banking Law contains eight statutes providing for preferential payment of deposits of various kinds in the event of insolvency of State banks. Sections 20, 30, 100 b(3), 166, 445, 456, 618, 621 of the New York Banking Law.

and some of its political subdivisions whose funds, by express statutory authority, may be secured by a pledge of assets.[20] The failure of the state legislature to require security for deposits of public money belonging to second-class cities simply reveals the absence of a uniform policy in the state relative to the securing of public monies.[21]

(D) The New York decisions are to the effect that New York courts should follow the decisions of the Supreme Court in the interpretation and construction of Federal statutes, and Federal policies thereunder implied including the National Banking statutes and decisions construing the same.

The following cases support the above entitled caption:

In *Hatermister* v. *First National Bank*, (1876) 64 N. Y. 212, the Court of Appeals stated at page 214:

> "The Supreme Court of the United States having given an interpretation to the act of congress regulating the interest which may be lawfully taken by national banks, and declaring the penalties for demanding or receiving interest at a greater rate than that allowed by law, adverse to the views of this court, as expressed in *The National Bank of Whitehall* v. *Lamb* (50 N. Y. 95), neither that case nor that of *The Farmers' Bank of Fayetville* v. *Hale* (59 N. Y. 53) can be longer considered as furnishing a rule for decision in cases within the principle of the adjudication by the Federal court. The decisions of that court in all matters of Federal jurisprudence and of the interpretation of the acts of congress, are paramount to and binding upon all other courts."

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[20] Sections 8, 10, 11, and 62 of the *State Finance Law;* section 145 of the *County Law;* section 64 of the *Town Law;* section 196 of the *Greater New York Charter.*

[21] This is also reflected by the failure of the legislature to continue former provisions for security of certain school district funds in recent amendments to section 254 of the *Education Law* and Village Funds in recent amendments to section 89 (20) of the *Village Law.* As recently as April 5, 1939, section 96 of the State Banking Law was amended to permit state banks to pledge assets as security for bankruptcy funds.

In *Appleton v. Citizens' Central National Bank*, (1908) 190 N. Y. 417, the Court of Appeals stated at page 420:

> "We may further assume that in transactions by national banks we should adopt the law of *ultra vires* as it prevails in the Federal courts, and not the local law on the subject."

And see *Duncomb et al.* v. *N. Y., H. & N. R. R. Co. et al.*, (1881) 84 N. Y. 190; *Longley* v. *Coons*, (1935) 244 A. D. 391, affirmed 268 N. Y. 712; *Buffalo German Ins. Co.* v. *Third Nat. Bank*, (1898) 29 A. D. 137.

In view of the foregoing it would seem that even if the instant case had arisen in the state courts of New York, th said courts would have felt impelled to follow the decisions of this Court in *Texas and Pacific Ry.* v. *Pottorff*, and *Marion* v. *Sneeden, supra*, in disposing of the issues involved in the instant case including the principles that no rights can arise upon an *ultra vires* pledge contract entered into by a national bank and that a receiver of a national bank cannot be prevented from recovering the illegally pledged collateral, or the proceeds thereof, or illegal or preferential payments made in reliance upon the illegal and *ultra vires* contract, by the erection of the doctrine of estoppel.

REPLY TO "POINT II" OF PETITIONERS' ARGUMENT.

Preliminary Statement.

The discussion, both in petitioners' brief and herein, under the foregoing point is restricted to the question of the validity of the payments made by the bank between the dates March 8, 1933 and March 18, 1933, and made therefore prior to the date of appointment of the conservator on March 20, 1933. Petitioners thus appear to concede that payments made by the conservator were illegal, assuming, of course, that petitioners' contentions under Point I of their argument are untenable and can not be sustained.

Having this assumption in mind, it seems clear that payments made by the conservator to petitioners were illegal. Section 203 of the Bank Conservation Act (U. S. C., title 12, sec. 203) provides:

> "The conservator, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all the rights, powers, and privileges now possessed by or hereafter given receivers of insolvent national banks and shall be subject to the obligations and penalties, not inconsistent with the provisions of this title, to which receivers are now or may hereafter become subject. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this subchapter, be the same as if a receiver had been appointed therefor."

Section 206 of the Bank Conservation Act (U. S. C., title 12, sec. 206) provides:

> "While such bank is in the hands of the conservator appointed by the Comptroller of the Currency, the Comptroller may require the conservator to set aside and make available for withdrawal by depositors and payment to other creditors, on a ratable basis, such amounts as in the opinion of the Comptroller may safely be used for this purpose; * * *"

Section 5236 of the Revised Statutes (U. S. C., title 12, sec. 194) provides for ratable distribution only to depositors and other creditors.

Consequently, such payments were contrary to the provisions of said Section 203 of the Bank Conservation Act, *supra*, in that they did not constitute ratable distribution to petitioners on a parity with the other depositors and other creditors of the bank, but constituted payments made

to petitioners alone, in full of their deposits, and under mistake of law by the conservator as to his authority to make such payments and in reliance upon the erroneous assumption that the pledge contract was valid.

ALL PAYMENTS MADE BY THE BANK TO THE PETITIONERS DURING THE BANKING HOLIDAY AND PRIOR TO THE APPOINTMENT OF THE CONSERVATOR WERE ILLEGAL AND WERE RECOVERABLE BY THE RECEIVER BECAUSE THEY CONSTITUTED PREFERENTIAL PAYMENTS PROHIBITED BY THE NATIONAL BANKING LAWS AND FURTHER BECAUSE SAID PAYMENTS WERE NOT AUTHORIZED UNDER THE PRESIDENT'S PROCLAMATIONS AND THE REGULATIONS ISSUED THEREUNDER.

(A) The Payments by the Bank to the Petitioners Between March 8th and March 18, 1933, Were in Violation of U. S. C., Title 12, Sec. 91.

Section 5242 of the Revised Statutes (U. S. C., title 12, sec. 91) (App. 51) prohibits payments to creditors of a bank after the commission of an act of insolvency or in contemplation thereof, made with a view to prevent the application of the assets of the bank in the manner prescribed by the national banking laws, or with a view to the preference of one creditor to another.

Said Section 5242 of the Revised Statutes appears to have been last considered by this Court in *Mechanics Co.* v. *Culhane*, (1936), 299 U. S. 51, 55, wherein Mr. Justice Brandeis, in delivering the opinion, said:

> "One of the objects of the national bank system is to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among unsecured creditors, and to prevent such banks from creating preferences in contemplation of their failure.

Compare *National Bank* v. *Colby*, 21 Wall. 609, 613-614; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 284, 290. To that end R. S. sec. 5242, 12 U. S. C. sec. 91, prohibits preferential payments. That prohibition is not directed solely to managing officers. The duty not so to defeat the just and equal distribution of the assets commanded by the Act rests upon all who obtain such knowledge by reason of their connection with the bank—upon directors and employees as well as upon the executive officers."

Both courts below found that this bank was insolvent on March 6, 1933, prior to any of the payments complained of (R. 159, 233). This Court will not disturb findings of fact made by a District Court concurred in by the Circuit Court of Appeals, except in cases of clearest error. *Charleston Min. Co.* v. *United States*, (1927), 273 U. S. 220, 223; *Page* v. *Rogers*, (1909), 211 U. S. 575, 577.

Where a bank suspends normal operations under a mandatory legislative act of the sovereign which created it, and does not thereafter reopen for normal banking transactions, its insolvency dates from suspension of payment. *Godfrey* v. *Terry*, (1877), 97 U. S. 171, 173. See also *Carrol et al.* v. *Green et al.*, (1875), 92 U. S. 509, 516; *Terry* v. *McLure*, (1880), 103 U. S. 442. This rule has been applied to national banks which closed pursuant to the President's proclamations. *Gimbel* v. *Harriman Nat. Bank & Trust Co.*, (S. D. N. Y., 1935), 11 F. Supp. 836, 839; *Goess* v. *Heckscher*, (S. D. N. Y. 1934) (App. 57); *Pyne* v. *Jackman*, (S. D. N. Y. 1934) 12 F. Supp. 653, 656. The rule has also been applied to state banks closed pursuant to state legislation or gubernatorial proclamation during the 1933 banking crisis. *Ghingher* v. *Pearson*, (Md., 1933), 168 A. 105; *Hospelhorn* v. *General Motors Corporation*, (Md., 1936), 182 A. 442; *Baker-Cammack Textile Corporation* v. *Hood*, (N. C., 1934), 175 S. E. 151; *In re Canal Bank & Trust Co.*, (La., 1934), 152 So. 578; and *In re Canal Bank & Trust Co. in Liquidation*, (La., 1934), 154 So. 498.

The insolvency of the Yonkers bank was before its officers, if they would contemplate it, on March 8, 1933, and consequently all payments made thereafter to the city were *ultra vires* and absolutely void. The rule is stated as follows in *Nelson* v. *Lewis*, (C. C. A. 2nd, 1934), 73 F. (2d) 521, 523.

> "If the financial condition of a bank is such that an actual act of insolvency is imminent, and the officers of the bank know or ought to know this condition, a payment to a creditor or depositor is void if not made in the ordinary course of business; an intent to prefer is presumed under such conditions, and as a rule the creditor and depositor need not know of the imminency of the act of insolvency. *National Security Bank* v. *Butler*, 129 U. S. 223, 9 S. Ct. 281, 32 L. Ed. 682; *Federal Reserve Bank of Kansas City* v. *Omaha Nat. Bank*, (C. C. A.) 45 F. (2d) 511; *Parks* v. *Knapp*, 29 F. (2d) 547 (C. C. A. 3); *American Surety Co. of N. Y.* v. *Jackson*, 24 F. (2d) 768 (C. C. A. 9); *Brill* v. *McInnes*, 14 F. (2d) 306 (C. C. A. 8)."

There is ample evidence to support the findings of the courts below that this bank was insolvent on March 6, 1933. This case was tried on January 9, 1938, almost five years after the bank's suspension, at which time the proceeds of the assets, plus stock assessment collections had permitted dividends to creditors totaling 50 per cent only. The extent to which the 40 per cent dividend of December 16, 1933, exhausted the assets is indicated by the fact that only ten per cent additional could be paid on November 3, 1937, after four more years of liquidation and after stock assessment collections had been added. The Federal courts will take judicial notice of the annual reports of the Comptroller of the Currency to Congress, *Tempel* v. *United States*, (1918), 248 U. S. 121, 130; *Hardee* v. *Washington Loan & Trust Co.*, (App. D. C. 1937) 91 F. (2) 314 and of the fact that sound banks located in cities of the Yonkers class were licensed to do an unrestricted business on March 15, 1933.

A further indication of the facts before the officers of this bank on March 6, 1933, may be found in the annual report of the Comptroller of the Currency to Congress for the year ending October 31, 1937, House Document No. 395, 75th Congress, 2nd Session, pages 350 to 353. This report evidences that the assets of the bank at suspension were estimated as "Good" $10,304,229; "Doubtful" $6,625,062 and "Worthless" $1,129,434 against creditor liabilities of $17,697,374. An assessment of $1,000,000 was levied against the shareholders resulting in collections of $388,606 which was added to the bank's assets to pay dividends.

The officers of the bank must be charged with knowledge of the fact that the other banks in the City of Yonkers were permitted to reopen on March 15, 1933, and, on the other hand, that still other banks, including their bank, were denied licenses to reopen on that date. Nevertheless, they made further payments to petitioners between March 15th and March 18, 1933 totaling $64,671.69. (R. 143 in No. 542, R. 91 in No. 543, R. 91 in No. 544.)

The authorities cited by the petitioners at page 31 of their brief including this court's decision in *McDonald, Receiver* v. *Chemical Nat'l Bank*, (1899), 174 U. S. 610, give the City no assistance under the facts in the instant case. All of these cases, where the decisions were adverse to the National bank Receiver, involved payments by the bank *in the ordinary course of business*. None of the cases cited involved payments made by a closed insolvent national bank during the National banking holiday.

Petitioners do not discuss or cite the decision of this Court in *Mechanics Co.* v. *Culhane, supra*, wherein the rule of *McDonald, Receiver* v. *Chemical Nat'l Bank* was recognized but where, nevertheless, the transaction was held to be an illegal preference. To quote from Mr. Justice Brandeis' opinion (299 U. S. 56),

> "It is true that ordinarily a payment made by a bank to a depositor in the usual course of business is not recoverable, even though the bank was then clearly in-

solvent. Compare *McDonald* v. *Chemical National Bank*, 174 U. S. 610. *But the payment here in question was not made in the usual course of business;* * * *" (Italics inserted)

Respondent submits that all of the payments here in question were likewise not made in the usual course of the bank's business.

The Yonkers bank ceased payments in the usual course of business on March 3, 1933, and the courts below found that on March 6, 1933 it was insolvent. The Yonkers bank never made any payments in the usual course of business after March 3, 1933. The President's proclamation and the regulations issued thereunder did not permit banks to resume payments in the ordinary course of business but permitted banks to make certain types of payments only, and then only *if their condition permitted.* Both courts below held that the payments by the bank during the banking holiday violated U. S. C., title 12, sec. 91 and we submit these decisions should be affirmed.

It is settled by the decisions of this Court in *Scott* v. *Armstrong*, (1892), 146 U. S. 499 and *Dakin* v. *Bayly*, (1933), 290 U. S. 143, that the rights of all parties against National banks attach at the time of insolvency. In the usual case insolvency is fixed by the resolution of the bank's board of directors surrendering the bank to the Comptroller of the Currency for liquidation. There was no occasion for this during the banking holiday, inasmuch as the banks were already closed by the Presidential proclamation, and were without authority to carry on their ordinary banking operations. They were thereafter either permitted to reopen, or were placed in conservatorship followed by receivership as the condition of the particular bank seemed to require. The Comptroller of the Currency was charged with the administration of the Bank Conservation Act of March 9, 1933, (U. S. C., title 12, sec. 201 et. al.) and it was his duty to determine the date of the insolvency of the banks remaining closed under the Act, for the purposes of computing in-

terest on deposits, allowing offset claims, and allowing claims against the liquidator. In the instant case (as in all cases where a conservator was appointed and the bank ultimately was liquidated) the Comptroller fixed the date of insolvency as the last date on which the bank did an unrestricted banking business. (R. 49.) Hundreds of National banks have been liquidated under this principle and nearly seven years have elapsed since the banking holiday. The trial court found that the rights of the creditors of this bank in the instant case became fixed as of March 6, 1933. (R. 159.) This creates no conflict inasmuch as the bank never reopened after March 3, 1933, and the payments complained of commenced on March 8, 1933.

The contemporaneous construction placed upon a law by the officer charged with its administration, where uniform and long continued, will be given great weight by the courts in passing upon a statute so construed and in case of doubt will be controlling. *Plummer* v. *United States,* (1912) 224 U. S. 137; *United States* v. *Finnell,* (1902) 185 U. S. 236; *Heath* v. *Wallace,* (1891) 138 U. S. 582. The following cases support the soundness of the Comptroller's decision that the rights of all parties against these banks attached on the date they last did an unrestricted banking business:

Hardee v. *Washington Loan & Trust Co., supra.*
Dehne v. *Mine Safety Appliance Co.,* (C. C. A. 3rd, 1938), 94 F. (2d) 956.
Goess v. *Heckscher,* (App. 57).
Willing v. *Eveloff,* (C. C. A. 3rd, 1938), 94 F. (2d) 344, cert. denied (1938) 305 U. S. 611.
Kullman & Co. v. *Woolley,* (C. C. A., 5th, 1936), 83 F. (2d) 129.

(B) The Payments Made by the Bank to the Petitioners Between March 8th and March 18, 1933 Were Not Authorized Under the President's Proclamations and the Regulations Issued Thereunder.

All of the payments totaling $89,942.73 made by the bank to the City between March 8th and March 18, 1933 and while the bank was closed under the President's proclamations were illegal and were recoverable, *independently* of the *illegal preference section*, Section 5242 of the Revised Statutes, (U. S. C., title 12, sec. 91). The Receiver alleged in his complaint (R. 8, 26) that these payments were "unlawful, illegal, *ultra vires*, null and void."

The President's proclamations (App. 54-56) prohibited all banks from making any payments whatsoever either for payroll or any other purposes. The proclamation of March 6, 1933 provided "that during said period all banking transactions shall be suspended. During such holiday, excepting as hereinafter provided, no such banking institution or branch shall pay out, * * * nor shall any banking institution or branch pay out deposits, * * * or transact any other banking business whatsoever." A penalty was provided for violations.

One of the purposes of the proclamations was the protection of the interests of depositors. The situation under the banking holiday is discussed by the United States Court of Appeals for the District of Columbia in *Hardee* v. *Washington Loan & Trust Co.*, (App. D. C., 1937), 91 F. (2d) 314, wherein the court says at page 316:

> "On March 9, 1933, the President sent a message to both Houses of Congress containing among others the following statements:
>
> "On March 3 banking operations in the United States ceased. To review at this time the causes of this failure of our banking system is unnecessary. Suffice it to say that the Government has been compelled to step in *for the protection of depositors* and the business of the nation." (Italics inserted.)

Judge Knox summarizes the purposes of the proclamations in his unreported opinion in *Goess, Receiver of the Harriman National Bank and Trust Company of the City of New York* v. *Heckscher*, (S. D. N. Y., 1934) (App. 57):

> "The emergency in the country's banking system that presented itself in March of 1933, was such as to induce the President to proclaim the memorable bank holiday that marked his inauguration and to follow it with his executive order of March 10, 1933. I cannot but conclude that one of the purposes of the action then taken was to conserve the status of the banks within the national system, and to fix the right of their debtors and creditors as of the date of the proclamation, unless and until it should thereafter appear that, as of such date, a particular bank was in condition to be permitted to resume business. Unfortunately, that condition could not be exhibited by Harriman National Bank and Trust Company, and it never reopened. If, during the time that the bank was closed some persons, to the exclusion of others, could position themselves so as to be preferred creditors of the institution, it would be most unfair to depositors who could not withdraw their funds, and it would, also, serve to frustrate the purposes and intent of the Presidential proclamation and executive order."

Regulation No. 10 of the Secretary of the Treasury, as amended on March 10, 1933, provided: (amended matter shown in italics)

> "Any national or State banking institution may exercise its usual banking functions to such extent as its situation shall permit and as shall be absolutely necessary to meet the needs of its community for food, medicine, other necessities of life, for the relief of distress, for the payment of usual salaries and wages, for necessary current expenditures for the purpose of maintaining employment, and for other similar essential purposes. *Banking institutions may carry out such transactions as may be necessary to aid banking institutions in other communities to meet the necessities set forth above.* Provided, however, That (1) every

precaution shall be taken to prevent hoarding or the unnecessary withdrawal of currency; (2) No State banking institution shall engage in any transaction under this regulation which is in violation of State or Federal law or of any regulation issued thereunder; (3) No National banking association shall engage in any transaction under this section which is in violation of any Federal law or of any order or regulation issued by the Comptroller of the Currency; and (4) No gold or gold certificates shall be paid out. Each banking institution and its directors and officers will be held strictly accountable for faithful compliance with the spirit and purpose as well as the letter of this regulation.

"Federal reserve banks may carry on such functions as may be necessary to facilitate transactions authorized by this regulation.

"In order to enable member banks of the Federal Reserve System to meet the needs of their respective communities to the extent authorized by this regulation Federal reserve banks may make advances to such member banks under the conditions set forth in Section 10 (b) of the Federal Reserve Act as amended by the act of March 9, 1933, and in accordance with authority granted by the Federal Reserve Board.

"In addition, in order to enable individuals, partnerships and corporations to meet their immediate payroll requirements, Federal reserve banks may make temporary advances to such individuals, partnerships and corporations on their promissory notes secured by direct obligations of the United States in accordance with authority granted by the Federal Reserve Board."

It will be noted from the foregoing that the banks were not permitted to carry on their usual banking functions unrestrictedly, but on the contrary they were limited to the operations therein specified. Furthermore, even these limited functions were further restricted in that they could be performed by a bank only "to such extent as its (the bank's) situation shall permit" and subject to the additional qualifications that "no national banking association shall engage in any transaction under this section which is in violation of any federal law" and that "each banking

institution and its directors and officers will be held strictly accountable for the faithful performance, with the spirit and purpose, as well as the letter of this regulation."

It follows from the foregoing that notwithstanding the provisions of said Regulation No. 10 permitting the limited operations therein specified, if such bank, while still remaining closed by virtue of the banking holiday, was, at such time, insolvent, its "situation" would not "permit" it to disburse any payments to any one or more of its depositors which were not also ratably made to all of its depositors and other creditors, inasmuch as said bank could not make such disbursements "in violation of any federal law", and the bank, its directors and officers, were required to be "strictly accountable, for the faithful performance, with the spirit and purpose, as well as the letter" of the regulation in performing the permitted limited functions. It was a violation of law for an insolvent bank thus remaining closed, to make preferential payments to certain depositors as distinguished from a *pro rata* distribution to all depositors, and the fact that the preferential disbursements thus made were to be used "for the payment of usual salaries and wages" did not change the legal consequences that such disbursements constituted preferential payments. Regulation No. 10 was withdrawn as of the close of business March 18, 1933 by regulation No. 28. (App. 56). The payments made by the Conservator, commencing March 20, 1933, (R. 143) were prohibited by the proclamations and regulations as well as the statute under which he was appointed, Section 203 of the Bank Conservation Act (U. S. C., title 12, sec. 203). The trial court found that all of these payments violated the proclamations and regulations (R. 194), and we submit this finding should be affirmed.

It follows, therefore, that the payments made between March 8 and March 18, 1933, were not authorized by the Presidential proclamations and the regulations issued thereunder.

CONCLUSION.

The judgments of both courts below in cases Nos. 542, 543, 544 and 545 should be affirmed and the petitioners should be allowed general creditor claims only against the bank receivership for all of their deposit balances reconciled as of the close of business March 3, 1933.

Respectfully submitted,

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APPENDIX.

U. S. C., Title 12, sec. 90. Depositaries of public moneys and financial agents of Government.

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State. (R. S. sec. 5153; Mar. 3, 1901, c. 871, 31 Stat. 1448; Mar. 4, 1907, c. 2913, sec. 3, 34 Stat. 1290; Dec. 23, 1913, c. 6, sec. 27, 38 Stat. 274; Aug. 4, 1914, c. 225, 38 Stat. 682; June 25, 1930, c. 604, 46 Stat. 809.)

U. S. C., Title 12, sec. 91. Transfers by bank and other acts in contemplation of insolvency.

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking as-

sociation, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. (R. S. sec. 5242.)

U. S. C., Title 12, sec. 192. Default in payment of circulating notes.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit

United States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited: *Provided*, That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depository shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than 2 percentum per annum upon the average monthly amount of such deposits. (R. S. sec. 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, sec. 339, 49 Stat. 721.)

U. S. C., Title 12, sec. 194. Dividends on adjusted claims; distribution of assets.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. sec. 5236.)

U. S. C., Title 28, sec. 41. (Judicial Code, section 24, amended.) Original jurisdiction. The district courts shall have original jurisdiction as follows:

• • • • • • • • • • •

(16) *Suits against national-banking associations.* Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said chapter. And all national banking associations established under the laws

of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located. (R. S. Sec. 563, par. 15, sec. 629, pars. 10, 11; Mar. 3, 1911, c. 231, sec. 24, par. 16, 36 Stat. 1092.)

Proclamation of President of March 6, 1933, declaring a bank holiday.

PROCLAMATION NO. 2039.

"WHEREAS there have been heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding; and

"WHEREAS continuous and increasingly extensive speculative activity abroad in foreign exchange has resulted in severe drains on the Nation's stocks of gold; and

"WHEREAS these conditions have created a national emergency; and

"WHEREAS it is in the best interests of all bank depositors that a period of respite be provided with a view to preventing further hoarding of coin, bullion or currency or speculation in foreign exchange and permitting the application of appropriate measures to protect the interests of our people; and

"WHEREAS it is provided in Section 5 (b) of the Act of October 6, 1917, (40 Stat. L. 411) as amended, 'That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency * * *' and

"WHEREAS it is provided in Section 16 of the said Act 'that whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act, shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisonment for not more than ten years, or both; * * *';

"NOW, THEREFORE, I, Franklin D. Roosevelt, President of the United States of America, in view of such national emergency and by virtue of the authority vested in me by said Act and in order to prevent the export, hoarding, or

earmarking of gold or silver coin or bullion or currency, do hereby proclaim, order, direct and declare that from Monday, the sixth day of March, to Thursday, the ninth day of March, Nineteen Hundred and Thirty Three, both dates inclusive, there shall be maintained and observed by all banking institutions and all branches thereof located in the United States of America, including the territories and insular possessions, a bank holiday, and that during said period all banking transactions shall be suspended. During such holiday, excepting as hereinafter provided, no such banking institution or branch shall pay out, export, earmark, or permit the withdrawal or transfer in any manner or by any device whatsoever, of any gold or silver coin or bullion or currency or take any other action which might facilitate the hoarding thereof; nor shall any such banking institution or branch pay out deposits, make loans or discounts, deal in foreign exchange, transfer credits from the United States to any place abroad, or transact any other banking business whatsoever.

"During such holiday, the Secretary of the Treasury, with the approval of the President and under such regulations as he may prescribe, is authorized and empowered (a) to permit any or all such banking institutions to perform any or all of the usual banking functions, (b) to direct, require or permit the issuance of clearing house certificates or other evidences of claims against assets of banking institutions, and (c) to authorize and direct the creation in such banking institutions of special trust accounts for the receipt of new deposits which shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separately in cash or on deposit in Federal Reserve Banks or invested in obligations of the United States.

"As used in this order the term 'banking institutions' shall include all Federal Reserve banks, national banking associations, banks, trust companies, savings banks, building and loan associations, credit unions, or other corporations, partnerships, associations or persons engaged in the business of receiving deposits, making loans, discounting business paper, or transacting any other form of banking business."

Proclamation of President of March 9, 1933, continuing Bank Holiday.

PROCLAMATION NO. 2040.

"WHEREAS, on March 6, 1933, I, FRANKLIN D. ROOSEVELT, President of the United States of America, by Proclamation declared the existence of a national emergency and proclaimed a bank holiday extending from Monday the 6th day of March to Thursday the 9th day of March, 1933, both dates inclusive, in order to prevent the export, hoarding or earmarking of gold or silver coin, bullion or currency, or speculation in foreign exchange; and

"WHEREAS, under the Act of March 9, 1933, all Proclamations heretofore or hereafter issued by the President pursuant to the authority conferred by section 5 (b) of the Act of October 6, 1917, as amended, are approved and confirmed; and

"WHEREAS, said national emergency still continues, and it is necessary to take further measures extending beyond March 9, 1933, in order to accomplish such purposes:

"NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, in view of such continuing national emergency and by virtue of the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. L. 411) as amended by the Act of March 9, 1933, do hereby proclaim, order, direct and declare that all the terms and provisions of said Proclamation of March 6, 1933, and the regulations and orders issued thereunder are hereby continued in full force and effect until further proclamation by the President."

REGULATION NO. 28 OF SECRETARY OF TREASURY. (March 18, 1933).

"After the close of business on March 18, 1933, Treasury Regulation No. 6 and Treasury Regulation No. 10, as amended, shall be without force or effect to authorize any banking transaction therein referred to."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

L 57-232

FREDERICK V. GOESS, as Receiver of THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK,
Plaintiff

against

AUGUST HECKSCHER, *Defendant*

OPINION

This is a highly interesting case, and it is a matter of real regret that the pressure upon the court is such that an extended statement of my views cannot be made. However, after a careful consideration of the facts and the law, I entertain the belief that plaintiff's motion should prevail. The emergency in the country's banking system that presented itself in March of 1933, was such as to induce the President to proclaim the memorable bank holiday that marked his inauguration and to follow it with his executive order of March 10, 1933. I cannot but conclude that one of the purposes of the action then taken was to conserve the status of the banks within the national system, and to fix the right of their debtors and creditors as of the date of the proclamation, unless and until it should thereafter appear that, as of such date, a particular bank was in condition to be permitted to resume business. Unfortunately, that condition could not be exhibited by Harriman National Bank and Trust Company, and it never reopened. If, during the time that the bank was closed some persons, to the exclusion of others, could position themselves so as to be preferred creditors of the institution; it would be most unfair to depositors who could not withdraw their funds, and it would, also, serve to frustrate the purposes and intent of the Presidential proclamation and executive order. Hence the motion is granted.

JOHN C. KNOX, U. S. D. J.

12/1/34

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MAY 16 1940
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CLERK

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 542.

THE CITY OF YONKERS,

Petitioner,

vs.

WALTER F. DOWNEY, Receiver of the First National Bank and Trust Company of Yonkers, in Liquidation.

PETITION OF THE CITY OF YONKERS FOR A REHEARING.

E. J. DIMOCK,
Counsel for Petitioner.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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This cause was one of four (Nos. 542, 543, 544 and 545) argued February 29, 1940. On April 22, 1940, an opinion was handed down directing the affirmance of the judgment below. (84 Law. Ed. Adv. Op. 681) In three of these causes (Nos. 542, 543 and 544) a point was involved which counsel believe was misapprehended by the court. Identical petitions for rehearing are therefore filed in those three cases.

In the petitioners' brief the point was made that payments aggregating $89,942.73 which were made by the bank upon the order of the City after the proclamation of the general bank holiday but prior to the appointment of the

conservator, were not recoverable under Section 91 of Title 12 U.S.C.A., the statute involved.

That section provides:

> " all payments of money to either (shareholders or creditors), made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; * * *"

This point was disposed of by this court in six lines as follows:

> "The Circuit Court of Appeals affirmed this action. It held all withdrawals after March 9th occurred when the facts indicated The Bank would be unable to pay depositors in due course and that adequate evidence supported the trial court's finding of an intent to prefer. We find no reason to disregard these findings by two courts and accept them as correct."

We believe that this court was misled into treating the point as though a question of fact had been involved when in truth the question was purely one of law. We believe that the circumstance that the point was not orally argued is responsible for the misunderstanding. Counsel for the City upon the argument became so interested in the inquiries of the Court upon the question which involved the whole judgment as to save no time to argue this question which involves a part of the judgment only.

It was settled in *McDonald* vs. *Chemical National Bank*, 174 U. S. 610, 1898, that payments may not be recovered on

mere proof that they were made by officers of an insolvent bank with full knowledge of its insolvency.

The applicable part of the opinion in the *McDonald* case written by Mr. Justice Shiras, is as follows:

> "Nor can a finding that the payments and remittances made to the Chemical National Bank, on the dates above mentioned were made in contemplation of insolvency and with an intent to prefer that bank, be based on the mere allegation that the Capital National Bank was actually insolvent, and that its insolvency must have been known to its officers. It is matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided.
>
> In the present instance there was not only no allegation of payments made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, but there was no evidence that, up to the closing hours of January 21, 1893, the Capital National Bank had failed to pay any depositor on demand, or had not met at maturity all its obligations. And the evidence fails to disclose any intention or expectation on the part of its officers to presently suspend business. It rather shows that, up to the last, the operations of the bank and its transactions with the

> Chemical National Bank were conducted in the usual manner. It may be that those of its officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the defendant bank. The Chemical National Bank was no more preferred by these remittances several days before suspension than were the depositors whose checks were paid an hour before the doors were closed. Indeed, it is stipulated that the Capital National Bank continued to transact its usual and ordinary business up to the close of banking hours on January 21, 1893."

The proof in this case, under the utmost inference, goes no farther than that in the *McDonald* case. The only evidence here was that the bank was closed with all other banks in the country by presidential proclamation and that it never reopened.

There is not, and cannot be, a suggestion that the City suspected the insolvency of the bank when the payments were made. There is not, and cannot be, a suggestion that the payments were for excessive amounts or for suspicious purposes. They were payments to meet payrolls and fire and police pension rolls. (No. 542. R. 166, 167, 181; No. 543. R. 121, 135; No. 544. R. 118.)

Counsel for the receiver in this court made no attempt to support the decision below as a finding of fact except in so far as it was a finding of insolvency. Insolvency was not in issue. The City's position was that, granting insolvency at the time of the payments, the law does not require the return of the payments.

Opposing counsel's only attempt to meet the *McDonald* case was to say that the payments made by the banks during the banking holiday were not made in the "usual course of business" as were those in the *McDonald* case. That flies in the face of the language of the Regulation of the Secretary of the Treasury* which defines the permitted transactions by providing that any bank may exercise its "usual banking functions". Moreover to say that all banking transactions in the country were out of the usual course of business and that therefore these were out of the usual course of business is a mere verbal trick. It ignores the reason behind the rule that payments made in the usual course of business by an insolvent bank are lawful.

If the opinion in this Court is to stand, this Court will have overruled *McDonald* vs. *Chemical National Bank, supra,* and will for the first time have permitted a receiver to recover payments made by a national bank upon mere proof of its insolvency when they were made.

The only other point made by counsel for the receiver, i. e., that the payments did not come within the terms of the governmental order and thus were recoverable "*independently* of the *illegal preference section*",† was not noticed in the opinion of this Court or either of the other courts which have considered the case. We feel however that on a motion of this kind we should give it a few words. The claim is that the limitation of the exercise of usual banking functions "to such extent as its situation shall permit" changed, for that particular period, the rule that payments made in the usual course of business by an insolvent bank are lawful. Our position is that if the Secretary of the Treasury had wished

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* Respondents' brief p. 47.

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to put that clog upon payments "absolutely necessary * * for food, medicine * * usual salaries and wages * * and for other similar essential purposes" he would not have left it to such shadowy inference. His obvious purpose in the limitation was to avoid the imputation that he was legalizing payments which otherwise would have been unlawful.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Circuit Court of Appeals for the Second Circuit be, on further consideration, reversed.

Respectfully submitted,

E. J. DIMOCK,
Counsel for Petitioner.

LEONARD G. MCANENY,
J. DONALD RAWLINGS,
Of Counsel.

Certificate of Counsel

I, E. J. DIMOCK, Counsel for the above named petitioner Do HEREBY CERTIFY that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

E. J. DIMOCK,
Counsel for Petitioner.

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OCTOBER TERM, 1939.

No. 543.

JOHN J. CONDON, Mayor, GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller, and RAYMOND J. WHITNEY, City Manager, Acting as Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of The City of Yonkers,

Petitioners,

vs.

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PETITION OF JOHN J. CONDON, GUSTAV W. KLEIN, JR., AND RAYMOND J. WHITNEY FOR A REHEARING.

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In the petitioners' brief the point was made that payments aggregating $89,942.73 which were made by the bank upon the order of the City after the proclamation of the general bank holiday but prior to the appointment of the conservator, were not recoverable under Section 91 of Title 12 U.S.C.A., the statute involved.

That section provides:

> " all payments of money to either (shareholders or creditors), made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; * * *"

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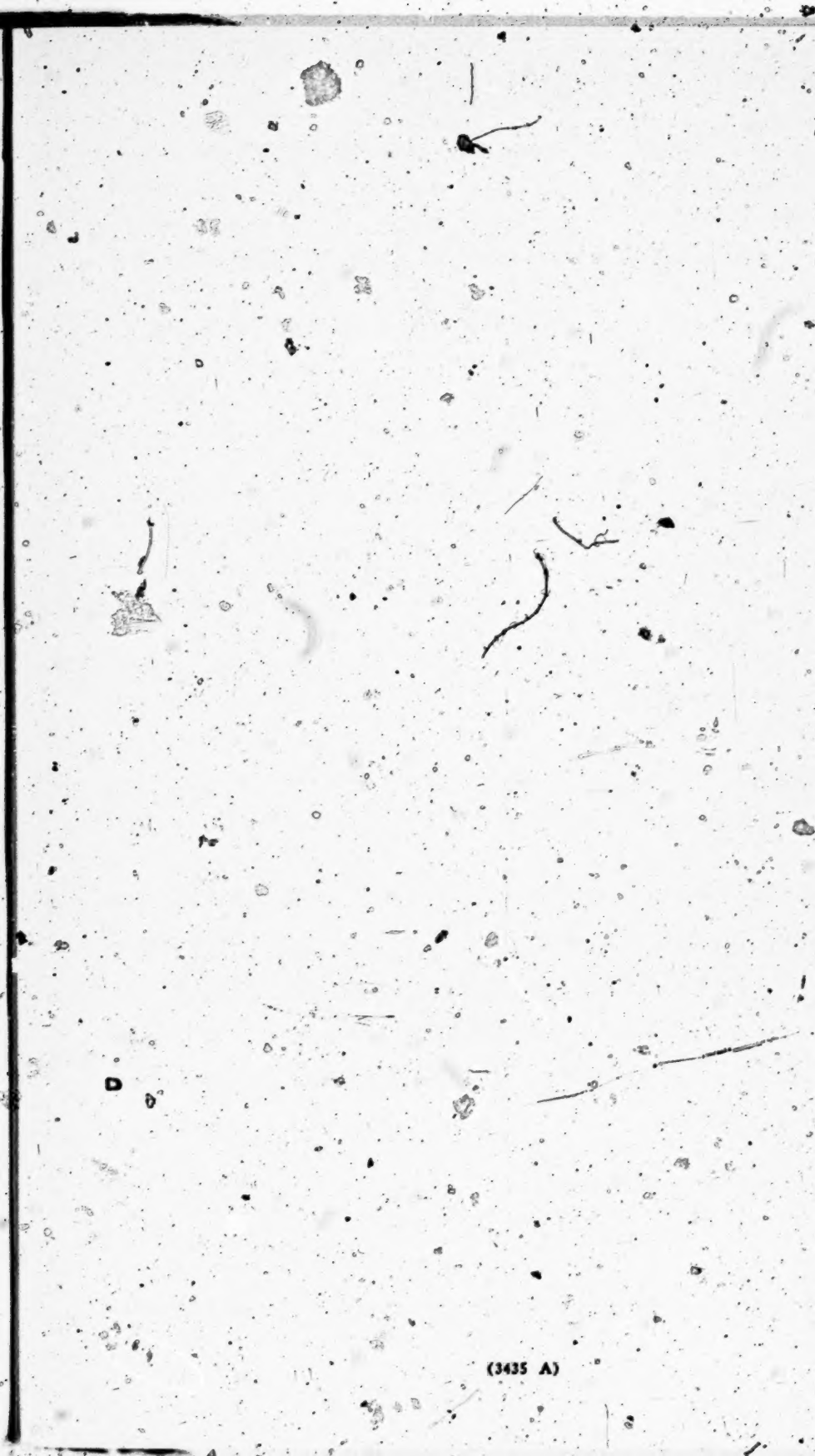

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>
> In the present instance there was not only no allegation of payments made in contemplation of insolvency, or with a view to prefer the Chemical National

Bank, but there was no evidence that, up to the closing hours of January 21, 1893, the Capital National Bank had failed to pay any depositor on demand, or had not met at maturity all its obligations. And the evidence fails to disclose any intention or expectation on the part of its officers to presently suspend business. It rather shows that, up to the last, the operations of the bank and its transactions with the Chemical National Bank were conducted in the usual manner. It may be that those of its officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the defendant bank. The Chemical National Bank was no more preferred by these remittances several days before suspension than were the depositors whose checks were paid an hour before the doors were closed. Indeed, it is stipulated that the Capital National Bank continued to transact its usual and ordinary business up to the close of banking hours on January 21, 1893."

The proof in this case, under the utmost inference, goes no farther than that in the *McDonald* case. The only evidence here was that the bank was closed with all other banks in the country by presidential proclamation and that it never reopened.

There is not, and cannot be, a suggestion that the City suspected the insolvency of the bank when the payments were made. There is not, and cannot be, a suggestion that the payments were for excessive amounts or for suspicious purposes. They were payments to meet payrolls and fire and police pension rolls. (No. 542. R. 166, 167, 181; No. 543. R. 121, 135; No. 544. R. 118.)

Counsel for the receiver in this court made no attempt to support the decision below as a finding of fact except in so far as it was a finding of insolvency. Insolvency was not in issue. The City's position was that, granting insolvency at the time of the payments, the law does not require the return of the payments.

Opposing counsel's only attempt to meet the *McDonald* case was to say that the payments made by the banks during the banking holiday were not made in the "usual course of business" as were those in the *McDonald* case. That flies in the face of the language of the Regulation of the Secretary of the Treasury* which defines the permitted transactions by providing that any bank may exercise its "usual banking functions". Moreover to say that all banking transactions in the country were out of the usual course of business and that therefore these were out of the usual course of business is a mere verbal trick. It ignores the reason behind the rule that payments made in the usual course of business by an insolvent bank are lawful.

If the opinion in this Court is to stand, this Court will have overruled *McDonald* vs. *Chemical National Bank, supra,* and will for the first time have permitted a receiver to recover payments made by a national bank upon mere proof of its insolvency when they were made.

The only other point made by counsel for the receiver, i. e., that the payments did not come within the terms of the governmental order and thus were recoverable *"independently* of the *illegal preference section"*,† was not noticed in the opinion of this Court or either of the other courts which have considered the case. We feel however that on a motion

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* Respondents' brief p. 47.

† Respondents' brief p. 46.

of this kind we should give it a few words. The claim is that the limitation of the exercise of usual banking functions "to such extent as its situation shall permit" changed, for that particular period, the rule that payments made in the usual course of business by an insolvent bank are lawful. Our position is that if the Secretary of the Treasury had wished to put that clog upon payments "absolutely necessary * * for food, medicine * * usual salaries and wages * * and for other similar essential purposes" he would not have left it to such shadowy inference. His obvious purpose in the limitation was to avoid the imputation that he was legalizing payments which otherwise would have been unlawful.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Circuit Court of Appeals for the Second Circuit be, on further consideration, reversed.

Respectfully submitted,

E. J. DIMOCK,
Counsel for Petitioners.

LEONARD G. MCANENY,
J. DONALD RAWLINGS,
Of Counsel.

Certificate of Counsel

I, E. J. DIMOCK, Counsel for the above named petitioner DO HEREBY CERTIFY that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

E. J. DIMOCK,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 543.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

NOTICE AND MOTION TO SUBSTITUTE PARTIES.

E. J. DIMOCK,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 543.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

To BENJAMIN W. MOORE, Esq.,
30 South Broadway,
Yonkers, New York,
Counsel for Respondent.

SIR:

PLEASE TAKE NOTICE that on the 5th day of February, 1940, or as soon thereafter as counsel can be heard, the within motion to substitute John J. Condon, Mayor, Gustav

W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, now constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, as petitioners herein, as successors to and in the place and stead of Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety, respectively, will be submitted to the Supreme Court of the United States.

A printed copy of the motion to substitute is served upon you herewith.

E. J. Dimock
Counsel for Petitioners.

Due and timely service accepted
this 25th day of January, 1940.

Benjamin W. Moore
Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 543.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

MOTION TO SUBSTITUTE PARTIES.

COME NOW the petitioners in the above entitled cause, and move that John J. Condon, Mayor of the City of Yonkers, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, be substituted as petitioners therein in the place and stead of Joseph F. Loehr, former Mayor of the City of Yonkers, James J. Hushion, former Comptroller of the City of

Yonkers, and Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers, and in support of this motion make the following brief statement of the matter involved, and the reasons relied upon for the substitution:

I.

This application is made under and pursuant to Section 780 of Title 28 U. S. C. (§11, 43 Stat. 941; Feb. 13, 1925).

II.

On November 20, 1939, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, filed in this Court their petition for certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered on August 22, 1939. On December 18, 1939, this Court granted certiorari (84 L. ed. 250).

III.

The Police Pension Fund of the City of Yonkers is created and its administration provided for by Local Law No. 1-1931 of the City of Yonkers, which provides, so far as is material to this motion, as follows:

"CITY OF YONKERS

LOCAL LAW No. 1-(1931)

A LOCAL LAW OF THE CITY OF YONKERS TO AMEND AND SUPERSEDE ARTICLE XI, POLICE PENSION FUND OF THE SUPPLEMENTAL CHARTER OF SAID CITY, CONTAINED IN CHAPTER 452 OF THE LAWS OF 1908, AS

AMENDED, ENTITLED 'AN ACT TO SUPPLEMENT THE GENERAL LAWS RELATING TO THE GOVERNMENT OF THE CITY OF YONKERS, AND TO REVISE AND CONSOLIDATE THE LOCAL LAWS RELATING THERETO.'

Be it enacted by the Common Council of the City of Yonkers, as follows:—

Section 1. Article XI, Police Pension Fund of the Supplemental Charter of the City of Yonkers, N. Y., being part of Chapter 452 of the Laws of 1908 as amended, entitled 'An act to supplement the general laws relating to the government of the City of Yonkers, and to revise and consolidate the local laws relating thereto,' is hereby amended and superseded to read as follows:

Section 1. The Mayor, the Comptroller and the Commissioner of Public Safety and their successors in office, shall constitute a board of trustees of the Police Pension Fund; and they shall have the care, control, management and distribution of said funds as provided by law. The Comptroller shall be the custodian of the said fund, and the City Treasurer shall be the treasurer thereof."

The entire Local Law is set forth in the transcript of record heretofore filed herein on pages 109 to 118, inclusive.

IV.

On December 31, 1939, the terms of office of Joseph F. Loehr, as Mayor of the City of Yonkers, and Dennis M. Morrissey, as Commissioner of Public Safety of the City of Yonkers, expired, and on January 20, 1940, James J. Hushion retired from the office of Comptroller of the City of Yonkers.

V.

On January 2, 1940, John J. Condon succeeded said Joseph F. Loehr, as Mayor of the City of Yonkers, having on that date been duly chosen for such office by the Common Council of said City of Yonkers acting under the authority of the following provisions of Section 5 of Article XV of the Supplemental Charter of the City of Yonkers (Chap. 452, Laws of New York, 1908, as amended by a Local Law duly adopted by the Electors of the City of Yonkers at a general election held in said City on November 8, 1938):

> "SECTION 5. *Mayor.* The elective offices of the city other than the offices of councilman, supervisor, two city judges and four justices of the peace, are hereby abolished. The common council elected in 1939 and each newly elected common council thereafter shall at its first meeting choose one of its members as presiding officer, who shall have the title of mayor."
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> "• • •"

VI.

On January 2, 1940, Raymond J. Whitney was duly appointed City Manager of the City of Yonkers by the Common Council of the City of Yonkers, pursuant to authority duly vested in them, and on January 3, 1940 assumed the duties of his office as City Manager. In and by the Charter of the City of Yonkers (Chap. 452, Laws of N. Y. 1908, as amended by a Local Law duly adopted by the Electors of the City of Yonkers at a general election held in said City on November 8, 1938), it is provided, among other things, as follows:

"ARTICLE XVI.

THE CITY MANAGER.

"SECTION 1. *Existing Departments of the City.* The existing departments, divisions and boards of the city government are continued unless changed by the provisions of this amendment: Except as in this amendment otherwise provided, the common council shall have and possess all the powers of and shall either perform or supervise and provide for the performance of all the duties heretofore imposed upon the common council, the various city departments, city boards and commissions, the heads of city departments and all other officers of the city whether elective or appointive. Except as established by the provisions of this amendment, the common council may change, increase, reduce, abolish, combine, and rearrange the departments, divisions and boards of the city government.

"SECTION 2. *City Manager.* The common council shall appoint a city manager, who shall be the chief executive and administrative officer of the city. The city manager shall be chosen by the common council solely on the basis of his executive and administrative qualifications with special reference to his actual experience in or knowledge of accepted practice in respect to the duties of his office as hereinafter outlined. No persons elected to the common council shall be chosen as city manager during the term for which he was elected.

"• • •

"SECTION 4. *Responsibility of Managers—Powers of Appointment and Removal.* The city manager shall be responsible to the common council for the proper administration of all the affairs of

the city placed in his charge, and to that end, subject to any existing provisions as to term of office, conditions of removal, or compensation, as may be imposed by state law, shall have the power to appoint and remove all heads of departments including the comptroller and other officers and employees in the administrative service of the city and to fix their salaries subject to any limitation which the common council may impose; but the manager may authorize the head of a department or office responsible to him to appoint and remove subordinates in such department or office. The city manager himself may act as head of a department when in his judgment the appointment of another person to such office is not necessary. Appointments made by, or under the authority of, city manager shall be on the basis of executive and administrative ability and of the training and experience of such appointees in the work which they are to perform. All such appointments shall be without definite term, unless for provisional, temporary or emergency service.

"Every administrative officer or employee who is in office at the time this amendment takes effect shall continue in office until the city manager or other person duly authorized by the city manager shall appoint a successor to such administrative officer or employee unless such administrative office or position be abolished by the common council and except that in the case of death or incapacity of the incumbent or of his refusal to act, the common council may fill such vacancy by temporary appointment."

VII.

The Comptroller is the head of the Department of Finance (Article III-A, §1, Charter of the City of Yonkers, Chap. 452, Laws of N. Y., 1908, as amended by Chap. 667, Laws of 1933). The Commissioner of Public Safety is the head of the Department of Public Safety (N. Y. Second Class Cities Law, §130).

VIII.

On January 22, 1940, pursuant to authority vested in him by Section 4 of Article XVI of the Charter of the City of Yonkers, *supra,* Raymond J. Whitney, City Manager, designated Gustav W. Klein, Jr., First Deputy Comptroller, as Acting Comptroller of the City of Yonkers. Gustav W. Klein, Jr. as First Deputy and Acting Comptroller, has assumed and is now performing all of the duties and exercising all of the powers of Comptroller, and is the successor in office of James J. Hushion, former Comptroller.

IX.

On January 3, 1940, pursuant to the authority duly vested in him by Section 4 of Article XVI of the Charter of the City of Yonkers, *supra,* Raymond J. Whitney, City Manager, duly made it known that in his judgment it was unnecessary to appoint another person to the office of Commissioner of Public Safety of the City of Yonkers and has, since January 3, 1940, acted as Commissioner of Public Safety of the City of Yonkers, and as such is the successor

in office to said Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers.

X.

There is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved therein. From Local Law No. 1—(1931) heretofore set forth in full in paragraph numbered III, it appears that the persons who constitute the Board of Trustees of the Police Pension Fund of the City of Yonkers are so constituted by reason of the office which they hold in the municipal government of the City of Yonkers. The individuals constituting such Board of Trustees have no personal interest in the fund which is held for the benefit of the policemen of the City of Yonkers. The termination of the terms of office of Joseph F. Loehr as Mayor, James J. Hushion as Comptroller, and Dennis M. Morrissey as Commissioner of Public Safety in no way renders the issues involved in this cause academic, and has in no way relieved the necessity for a decision by this Court upon the issues involved therein.

XI.

The said John J. Condon, Gustav W. Klein, Jr., and Raymond J. Whitney have been advised of the making of this motion and have consented thereto, as appears from their written consent attached hereto as Exhibit A.

XII.

The said Joseph F. Loehr, James J. Hushion, and Dennis M. Morrissey have been advised of the making of this motion and have consented to the substitution of said John J. Condon, Gustav W. Klein, Jr., and Raymond J. Whitney in their place and stead as prayed for herein, as appears from their written consent attached hereto as Exhibit B.

XIII.

Less than six months have expired since the terms of office of said Joseph F. Loehr, and Dennis M. Morrissey expired and since said James J. Hushion retired, and there is no provision in the law of the State of New York limiting the time within which the application may be made.

WHEREFORE, petitioners pray that John J. Condon, Mayor of the City of Yonkers, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers now constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, be substituted herein as petitioners, in the place and stead of Joseph F. Loehr, former Mayor of the City of Yonkers, James J. Hushion, former Comptroller of the City of Yonkers, and Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers; that John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the

City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, be permitted to continue and maintain this cause; and that the title of the cause be amended to read:

"JOHN J. CONDON, Mayor, GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller and RAYMOND J. WHITNEY, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, Petitioners, against WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation."

Respectfully submitted,

E. J. DIMOCK
Counsel for Petitioners.

Dated: January 24, 1940.

Exhibit A.

We, JOHN J. CONDON, Mayor of the City of Yonkers, GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller of the City of Yonkers, and RAYMOND J. WHITNEY, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, have read the foregoing motion praying that we be substituted in the place and stead of Joseph F. Loehr, former Mayor of the City of Yonkers, James J. Hushion, former Comptroller of the City of Yonkers, and Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers, in the said cause now pending before the Supreme Court of the United States, and we hereby consent to the continuance of said cause and to be substituted as petitioners therein.

Dated: Yonkers, New York, January 23, 1940.

JOHN J. CONDON
Mayor of the City of Yonkers.

GUSTAV W. KLEIN, JR.
First Deputy and Acting Comptroller of the City of Yonkers.

RAYMOND J. WHITNEY
City Manager, Acting as Commissioner of Public Safety of the City of Yonkers.

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 23 day of January, 1940, before me came JOHN J. CONDON, Mayor of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 23 day of January, 1940, before me came GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 23 day of January, 1940, before me came RAYMOND J. WHITNEY, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

Exhibit B.

We, JOSEPH F. LOEHR, former Mayor of the City of Yonkers, JAMES J. HUSHION, former Comptroller of the City of Yonkers, and DENNIS M. MORRISSEY, former Commissioner of Public Safety of the City of Yonkers, have read the foregoing motion praying that John J. Condon, now Mayor of the City of Yonkers, Gustav W. Klein, Jr., now First Deputy and Acting Comptroller of the City of Yonkers, and Raymond J. Whitney, now City Manager, acting as Commissioner of Public Safety of the City of Yonkers, be substituted respectively in our place and stead in the above entitled cause now pending before the Supreme Court of the United States, and we hereby consent to such substitution and to the continuance of the said cause by the said John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers.

Dated: Yonkers, New York, January 24, 1940.

JOSEPH F. LOEHR

JAMES E. HUSHION

DENIS M. MORRISSEY

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 24 day of January, 1940, before me personally came JOSEPH F. LOEHR, former Mayor of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 23 day of January, 1940, before me came JAMES J. HUSHION, former Comptroller of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

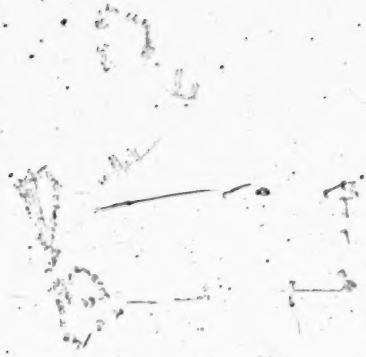
(NOTARIAL SEAL)

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 24 day of January, 1940, before me personally came DENNIS M. MORRISSEY, former Commissioner of Public Safety of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)



IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 544.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

NOTICE AND MOTION TO SUBSTITUTE PARTIES.

E. J. DIMOCK,
Counsel for Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 544.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

To:

BENJAMIN W. MOORE, Esq.,
30 South Broadway,
Yonkers, New York,
Counsel for Respondent.

Sir:

PLEASE TAKE NOTICE that on the 5th day of February, 1940, or as soon thereafter as counsel can be heard, the within motion to substitute John J. Condon, Mayor, Gustav

W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, as petitioners herein, as successors to and in the place and stead of Joseph F. Lochr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety, respectively, will be submitted to the Supreme Court of the United States.

A printed copy of the motion to substitute is served upon you herewith.

E. J. Dimock
Counsel for Petitioners.

Due and timely service accepted this 25th day of January, 1940.

Benjamin W. Moore
Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 544.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

MOTION TO SUBSTITUTE PARTIES.

COME NOW, the petitioners in the above entitled cause, and move that John J. Condon, Mayor of the City of Yonkers, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, be substituted as petitioners therein in the place and stead of Joseph F. Loehr, former Mayor of the City of Yonkers, James J. Hushion, former Comptroller of the City of Yonkers, and Dennis M. Morrissey, former Commissioner of

Public Safety of the City of Yonkers, and in support of this motion make the following brief statement of the matter involved, and the reasons relied upon for the substitution:

I.

This application is made under and pursuant to Section 780 of Title 28 U. S. C. (§11, 43 Stat. 941; Feb. 13, 1925).

II.

On November 20, 1939, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, filed in this Court their petition for certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered on August 22, 1939. On December 18, 1939, this Court granted certiorari (84 L. ed. 250).

III.

The Firemen's Pension Fund of the City of Yonkers is created and its administration provided for by Local Law No. 2—1931 of the City of Yonkers, which provides, so far as is material to this motion, as follows:

"CITY OF YONKERS

LOCAL LAW No. 2—(1931)

A local law of the City of Yonkers to amend and supersede Article XII, Firemen's Pension Fund of the Supplemental Charter of said city, contained

in Chapter 452 of the Laws of 1908, as amended, entitled 'An Act to Supplement the General Laws Relating to the Government of the City of Yonkers, and to Revise and Consolidate the Local Laws Relating Thereto'.

Be it enacted by the Common Council of the City of Yonkers as follows:

Section 1. Article XII, Firemen's Pension Fund of the Supplemental Charter of the City of Yonkers, N. Y., being part of Chapter 452 of the Laws of 1908 as amended entitled 'An act to supplement the general laws relating to the government of the City of Yonkers, and to revise and consolidate the local laws relating thereto,' is hereby amended and superseded to read as follows:

Section 1. The Mayor, the Comptroller and the Commissioner of Public Safety and their successors in office, shall constitute a board of trustees of the Firemen's Pension Fund; and they shall have the care, control, management and distribution of said funds as provided by law. The Comptroller shall be the custodian of the said fund, and the City Treasurer shall be the treasurer thereof."

The entire Local Law is set forth in the transcript of record heretofore filed herein on pages 108 to 116, inclusive.

IV.

On December 31, 1939, the terms of office of Joseph F. Loehr, as Mayor of the City of Yonkers, and Dennis M. Morrissey, as Commissioner of Public Safety of the City of Yonkers, expired, and on January 20, 1940, James J. Hushion retired from the office of Comptroller of the City of Yonkers.

V.

On January 2, 1940 John J. Condon succeeded said Joseph F. Loehr, as Mayor of the City of Yonkers, having on that date been duly chosen for such office by the Common Council of said City of Yonkers acting under the authority of the following provisions of Section 5 of Article XV of the Supplemental Charter of the City of Yonkers (Chap. 452, Laws of New York, 1908, as amended by a Local Law duly adopted by the Electors of the City of Yonkers at a general election held in said City on November 8, 1938):

> "Section 5. MAYOR. The elective offices of the city other than the offices of councilman, supervisor, two city judges and four justices of the peace, are hereby abolished. The common council elected in 1939 and each newly elected common council thereafter shall at its first meeting choose one of its members as presiding officer, who shall have the title of mayor."
>
> "* * *"

VI.

On January 2, 1940, Raymond J. Whitney was duly appointed City Manager of the City of Yonkers by the Common Council of the City of Yonkers, pursuant to authority duly vested in them, and on January 3, 1940 assumed the duties of his office as City Manager. In and by the Charter of the City of Yonkers (Chap. 452, Laws of N. Y. 1908, as amended by a Local Law duly adopted by the Electors of the City of Yonkers at a general election held in said City on November 8, 1938), it is provided, among other things, as follows:

"ARTICLE XVI.

THE CITY MANAGER.

"Section 1. *Existing Departments of the City.* The existing departments, divisions and boards of the city government are continued unless changed by the provisions of this amendment. Except as in this amendment otherwise provided, the common council shall have and possess all the powers of and shall either perform or supervise and provide for the performance of all the duties heretofore imposed upon the common council, the various city departments, city boards and commissions, the heads of city departments and all other officers of the city whether elective or appointive. Except as established by the provisions of this amendment, the common council may change, increase, reduce, abolish, combine, and rearrange the departments, divisions and boards of the city government.

"Section 2. *City Manager.* The common council shall appoint a city manager, who shall be the chief executive and administrative officer of the city. The city manager shall be chosen by the common council solely on the basis of his executive and administrative qualifications with special reference to his actual experience in or knowledge of accepted practice in respect to the duties of his office as hereinafter outlined. No persons elected to the common council shall be chosen as city manager during the term for which he was elected.

"• • •

"Section 4. *Responsibility of Managers—Powers of Appointment and Removal.* The city manager shall be responsible to the common council for the proper administration of all the affairs of the city

placed in his charge, and to that end, subject to any existing provisions as to term of office, conditions of removal, or compensation, as may be imposed by state law, shall have the power to appoint and remove all heads of departments including the comptroller and other officers and employes in the administrative service of the city and to fix their salaries subject to any limitation which the common council may impose; but the manager may authorize the head of a department or office responsible to him to appoint and remove subordinates in such department or office. The city manager himself may act as head of a department when in his judgment the appointment of another person to such office is not necessary. Appointments made by, or under the authority of, city manager shall be on the basis of executive and administrative ability and of the training and experience of such appointees in the work which they are to perform. All such appointments shall be without definite term, unless for provisional, temporary or emergency service.

"Every administrative officer or employee who is in office at the time this amendment takes effect shall continue in office until the city manager or other person duly authorized by the city manager shall appoint a successor to such administrative officer or employee unless such administrative office or position be abolished by the common council and except that in the case of death or incapacity of the incumbent or of his refusal to act, the common council may fill such vacancy by temporary appointment."

VII.

The Comptroller is the head of the Department of Finance (Article III-A §1, Charter of the City of Yonkers, Chap. 452, Laws of N. Y. 1908, as amended by Chap. 667,

Laws of 1933). The Commissioner of Public Safety is the head of the Department of Public Safety (N. Y. Second Class Cities Law §130).

VIII.

On January 22, 1940, pursuant to authority vested in him by Section 4 of Article XVI of the Charter of the City of Yonkers, *supra*, Raymond J. Whitney, City Manager, designated Gustav W. Klein, Jr., First Deputy Comptroller, as Acting Comptroller of the City of Yonkers. Gustav W. Klein, Jr. as First Deputy and Acting Comptroller, has assumed and is now performing all of the duties and exercising all of the powers of Comptroller, and is the successor in office of James J. Hushion, former Comptroller.

IX.

On January 3, 1940, pursuant to the authority duly vested in him by Section 4 of Article XVI of the Charter of the City of Yonkers, *sup.* , Raymond J. Whitney, City Manager, duly made it known that in his judgment it was unnecessary to appoint another person to the office of Commissioner of Public Safety of the City of Yonkers and has, since January 3, 1940, acted as Commissioner of Public Safety of the City of Yonkers and as such is the successor in office to said Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers.

X.

There is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved therein. From Local Law No. 2-(1931) heretofore set forth in full in paragraph numbered III, it appears that the persons who constitute the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers are so constituted by reason of the office which they hold in the municipal government of the City of Yonkers. The individuals constituting such Board of Trustees have no personal interest in the fund which is held for the benefit of the firemen of the City of Yonkers. The termination of the terms of office of Joseph F. Loehr as Mayor, James J. Hushion, as Comptroller and Dennis M. Morrissey as Commissioner of Public Safety in no way renders the issues involved in this cause academic, and has in no way relieved the necessity for a decision by this Court upon the issues involved therein.

XI.

The said John J. Condon, Gustav W. Klein, Jr., and Raymond J. Whitney have been advised of the making of this motion and have consented thereto, as appears from their written consent attached hereto as Exhibit A.

XII.

The said Joseph F. Loehr, James J. Hushion and Dennis M. Morrissey have been advised of the making of this motion and have consented to the substitution of said John

J. Condon, Gustav W. Klein, Jr., and Raymond J. Whitney in their place and stead as prayed for herein, as appears from their written consent attached hereto as Exhibit B.

XIII.

Less than six months have expired since the terms of office of said Joseph F. Loehr and Dennis M. Morrissey expired and since said James J. Hushion retired, and there is no provision in the law of the State of New York limiting the time within which the application may be made.

WHEREFORE, petitioners pray that John J. Condon, Mayor of the City of Yonkers, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers now constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, be substituted herein as petitioners in the place and stead of Joseph F. Loehr, former Mayor of the City of Yonkers, James J. Hushion, former Comptroller of the City of Yonkers, and Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers; that John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, be permitted to continue and maintain this cause; and that the title of the cause be amended to read:

"JOHN J. CONDON, Mayor, GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller and RAYMOND

J. WHITNEY, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, Petitioners, against WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation."

Respectfully submitted,

E. J. DIMOCK
Counsel for Petitioners.

Dated: January 24, 1940.

Exhibit A.

We, JOHN J. CONDON, Mayor of the City of Yonkers, GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller of the City of Yonkers, and RAYMOND J. WHITNEY, City Manager acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, have read the foregoing motion praying that we be substituted in the place and stead of Joseph F. Loehr, former Mayor of the City of Yonkers, James J. Hushion, former Comptroller of the City of Yonkers, and Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers, in the said cause now pending before the Supreme Court of the United States, and we hereby consent to the continuance of said cause and to be substituted as petitioners therein.

Dated: Yonkers, New York, January 23, 1940.

JOHN J. CONDON
Mayor of the City of Yonkers.

GUSTAV W. KLEIN, JR.
First Deputy and Acting Comptroller of the City of Yonkers.

RAYMOND J. WHITNEY
City Manager of the City of Yonkers acting as Commissioner of Public Safety.

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

On this 23 day of January, 1940, before me came JOHN J. CONDON, Mayor of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

On this 23 day of January, 1940, before me came GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

On this 23 day of January, 1940, before me came RAYMOND J. WHITNEY, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that the executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

Exhibit B.

We, JOSEPH F. LOEHR, former Mayor of the City of Yonkers, JAMES J. HUSHION, former Comptroller of the City of Yonkers, and DENNIS M. MORRISSEY, former Commissioner of Public Safety of the City of Yonkers, have read the foregoing motion praying that John J. Condon, now Mayor of the City of Yonkers, Gustav W. Klein, Jr., now First Deputy and Acting Comptroller of the City of Yonkers, and Raymond J. Whitney, now City Manager, acting as Commissioner of Public Safety of the City of Yonkers, be substituted respectively in our place and stead in the above entitled cause now pending before the Supreme Court of the United States, and we hereby consent to such substitution and to the continuance of the said cause by the said John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers.

Dated: Yonkers, New York, January 24, 1940.

JOSEPH F. LOEHR

JAMES E. HUSHION

DENIS M. MORRISSEY

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 24 day of January, 1940, before me personally came JOSEPH F. LOEHR, former Mayor of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

On this 23 day of January, 1940, before me came JAMES J. HUSHION, former Comptroller of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 24 day of January, 1940, before me personally came DENNIS M. MORRISSEY, former Commissioner of Public Safety of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

SUPREME COURT OF THE UNITED STATES.

Nos. 542, 543, 544 and 545.—October Term, 1939.

The City of Yonkers, Petitioner,
542 *vs.*
Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, In Liquidation.

John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, etc., Petitioners,
543 *vs.*
Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, In Liquidation.

John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, etc., Petitioners,
544 *vs.*
Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, In Liquidation.

The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund", Petitioner,
545 *vs.*
Walter F. Downey, as Receiver of The First National Bank and Trust Company of Yonkers, New York.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 22, 1940.]

Mr. Justice McReynolds delivered the opinion of the Court.

By these companion suits, begun during 1936, the Receiver of The First National Bank and Trust Company of Yonkers ("The Bank"), seeks to recover fifty per centum of deposits withdrawn by petitioners from the association while insolvent. Thus, it is said, they obtained unlawful preferences within the meaning of the

National Banking Act.[1] From corporate assets, general creditors have been paid dividends amounting to fifty per centum of their claims—forty, December, 1933; ten, November, 1937.

The Bank was located in New York. In each cause the points of law and fact are substantially alike. It will suffice to consider them as presented by the Record in No. 542.

Petitioner's deposits with The Bank, March 4, 1933, amounted to $277,000. To secure this and other smaller public ones, bonds of the association totalling $535,000 were in pledge.

The Governor of New York proclaimed Saturday, March 4th and Monday, March 6th, 1933, bank holidays. Later the President and the Governor extended such holidays through March 9th. The Bank was not opened for unrestricted business after March 3rd. A Conservator, appointed March 20th, remained in control until January 23, 1934, when a Receiver took charge.

Between March 9th and 20th, 1933, petitioner withdrew deposits amounting to $89,000; between March 20th and 28th, $67,000. On the latter day, under direction of the Conservator, petitioner's remaining deposits were paid and The Bank retook the pledged bonds.

A jury having been waived the cause was tried to the court upon pleadings and evidence. Among other things it found—

The pledge of assets by The Bank to secure the deposits was *ultra vires* and unlawful.

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[1] Title 12 U. S. C. A.—

Sec. 91. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. (R. S. § 5242.)

Sec. 194. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. § 5236.)

The Bank was insolvent March 6th, 1933, and as of that day the rights of creditors became fixed.

The payments of deposits to petitioner were not allowed by any Presidential Proclamation or Executive Order. They were made voluntarily under mistake of law by an officer of the United States and are recoverable. Also they were made with intent to give petitioner preference over other creditors.

No statute of New York confers upon state banks general power to pledge assets to secure deposits. They have no such power under the common law of New York.

Judgment went for the Receiver for fifty per centum of the amounts withdrawn by the petitioner after March 9, 1933, with interest, etc.

The Circuit Court of Appeals affirmed this action. It held all withdrawals after March 9th occurred when the facts indicated The Bank would be unable to pay depositors in due course and that adequate evidence supported the trial court's finding of an intent to prefer. We find no reason to disregard these findings by two courts and accept them as correct.

The Circuit Court of Appeals further held national banks have no implied power to pledge assets to secure deposits; that here The Bank was not empowered so to do by the Act June 25, 1930[2]; that

[2] Act June 25, 1930, c. 604, 46 Stat. 809; 12 U. S. C. A., sec. 90—

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State.

the pledge might be rescinded without return by the Receiver of the sums withdrawn. With these conclusions we agree.

Unless empowered by the Act June 25, 1930 or concerning federal funds (not here claimed) as in *Inland Waterways Corp.* v. *Frederick J. Young, Receiver* (March 25, 1940), national banks may not secure deposits by pledge of assets.

Texas & Pacific Ry. v. *Potforff*, 291 U. S. 245, 253-255, and *Marion* v. *Sneeden*, 291 U. S. 262, authoritatively interpreted the National Banking Act and approved the view that under this, a national bank possesses no inherent power to secure deposits, public or private, by pledging assets, and that such a pledge is both *ultra vires* and contrary to public policy. "The measure of their powers is the statutory grant; and powers not conferred by Congress are denied." Also, that in case of insolvency, assets so pledged, may be reclaimed without payment of the deposits. "To permit the pledge would be inconsistent with many provisions of the National Banking Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets." The results in these causes was not influenced by consideration of local law.

We cannot accept the suggestion of counsel for petitioner that the cited opinions merely declare a pledge of assets *ultra vires* and leave the consequences to be determined by the law of the state where it occurs. This view is not in harmony with the language of the opinions nor with the general purposes of the National Banking Act there pointed out.

Under the common law as interpreted in New York, pledge of securities by a state bank to secure deposits is "contrary to law and beyond the power and authority vested in the officers." Although forbidden, such a pledge will not be set aside unless deposits made in reliance upon it are first repaid. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, 187-188; *City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400, 406.

The Act of June 25, 1930 permits national banks to give security for public deposits "of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." Counsel maintain that within the fair intendment of this, state banks in New York are "authorized" to pledge bonds to secure public deposits. They rely upon the rulings of the local courts, in the causes last cited, concerning

conditions which must be met before an *ultra vires* act will be set aside.

They submit that corporations have capacity to accept the result of their actions. "That the capacity to accept the consequences of an *ultra vires* act is itself a power." Further, that "'giving' a power is but another word for 'authorizing' its exercise." Hence, the argument seems to run, as a state bank may hold the fruit of a pledge until return of the thing pledged, therefore, it is "authorized by law" to make a pledge thus conditioned.

In this procession, obviously, different meanings are attributed to the word "power" and it is confused with "capacity" and "authority." In one sense, every corporation has "power" to do wrong, also "capacity" to suffer the consequences of wrong-doing. But no corporation has authority to violate an inhibition or go beyond the limits of its charter. Authorization to do a forbidden thing cannot be inferred from capacity to accept the prescribed consequences. The law forbade local institutions to make pledges such as the one here in question.

The challenged judgments must be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.